83-295

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No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

LYNDA LEBOEUF COSTA,
PETITIONER,

v.

JOHN A. MARKEY, ET AL.,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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On the Petition:
ROBERT M. SOLOMON.

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Question Presented.

Whether, pursuant to a Title VII action under disparate impact analysis, a female plaintiff who has been denied appointment by an employment requirement that classifies far more women than men as ineligible for an employment position which is open to *both* men and women is prevented from establishing a prima facie case of discrimination because in a particular round of the hiring process the applicant pool contained only women.

List of Parties.

The plaintiff was identified in the complaint as "Lynda L. LeBoeuf (Costa)." The named defendants were: "John A. Markey, in his capacity as Mayor of the City of New Bedford; Joseph A. Pelletier, in his capacity as Chief of Police in the City of New Bedford; Rosalind Pool Brooker, Brian Lawler, Donald R. Perry, George Rogers, William Saltzman, Paul G. Hamel, Richard Bachand, David R. Nelson, Richard W. Hinkley, Manuel F. Neto, Ralph J. Saulnier, in their capacity as City Councillors for the City of New Bedford; Nancy Beecher, Wayne A. Budd, Richard J. Healey, Richard Linden, John Donegan, in their capacity as Commissioners on the Massachusetts Civil Service Commission; Ann Ramsey, in her capacity as Acting Personnel Administrator in the Massachusetts Executive Office for Administration and Finance."

Only those defendants who are officials of the City of New Bedford are represented in this petition.

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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 23, 1983.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is reported: *LeBoeuf* v. *Ramsey*, 503 F. Supp. 747 (D. Mass. 1980), and is reprinted in the appendix at page 47a.

The opinion of the original appellate panel of the United States Court of Appeals for the First Circuit is reported, *Costa* v. *Markey*, 672 F.2d 158 (1st Cir. 1982), and reprinted at appendix 28a.

The opinion of the rehearing panel of the United States Court of Appeals for the First Circuit is reported, *Costa* v. *Markey*, 694 F.2d 876 (1st Cir. 1982) and reprinted at appendix 11a.

The opinion of the rehearing *en banc* panel of the United States Court of Appeals for the First Circuit is reported, *Costa* v. *Markey*, 706 F.2d 1 (1st Cir. 1983) and reprinted at appendix 1a.

Jurisdiction.

The latest judgment of the United States Court of Appeals for the First Circuit, on rehearing *en banc*, was entered on May 23, 1983 and a copy is appended to this petition in the appendix at page 1a. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Statute Involved.

The statute involved is § 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1976). The pertinent parts are set forth below:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Statement of the Case.

The plaintiff, Lynda LeBoeuf Costa, is a 5 foot 3 inch woman who on October 14, 1972 took and passed a written examination administered by the Massachusetts Division of Civil Service for the position of police officer. In accordance with Massachusetts state law, all appointments to the New Bedford Police Department are subject to the Massachusetts Civil Service laws and the regulations promulgated thereunder.

Prior to February, 1974 the New Bedford Police Department had two separate and distinct positions for men and women police personnel, with separate examinations administered for the two positions. Men served as "police officers" and women as "policewomen." After February, 1974, the relevant time period for this action, the New Bedford Police Department discontinued the separate positions of "police officer" and "policewoman" and instead established the single position of "police officer" which was open to both men and women. Male and female police officers had the same duties, powers, responsibilities, privileges, and pay. Although previous to this change, women were subject to either a 5 feet 3 inch height requirement or to no height requirement whatsoever,

women were at this time made subject to a 5 feet 6 inch height requirement, as were men. Subsequent appointments to the police force were made from "integrated" lists of both men and women, compiled and certified to the city of New Bedford (hereinafter "city") by the Division of Civil Service.

In the spring and summer of 1974, the city sought to appoint several police officers to the police force. Among the city's needs at this time was the appointment of at least one additional female police officer to perform those certain additional duties of female police officers, related, for example, to female prisoners. The city requested and received permission for a sex-specific hiring from the Massachusetts Commission Against Discrimination. Subsequently, however, the Division of Civil Service certified to the city only an "integrated list" of men and women applicants for the "police officer" positions to be filled. This list was dated July 30, 1974. On August 12, 1974, the plaintiff was interviewed for a position as police officer, and although she passed the city's physical fitness examination, she was rejected solely because she failed to meet the 5 feet 6 inch height requirement.[1] Seven male applicants whose names appeared below that of the plaintiff's were appointed as police officers. No female candidates were appointed from the "integrated list."

After the use of the July 30 "integrated list" failed to result in the hiring of a female police officer, and after an additional female police officer retired, New Bedford sought and received approval to hire from a special list, derived from the July 30 "integrated list," containing only the names of the female applicants in the order that their names appeared on the "inte-

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[1] In February, 1975, well after the alleged discriminatory acts had occurred, it was discovered that the plaintiff's name had, in fact, been placed higher on the "integrated list" than it should have been. Nevertheless, the district court still found application of the height requirement to the "integrated list" to be a violation of Title VII.

grated list." Although plaintiff's name properly appeared first on this "all-women list", she was again rejected because of her failure to satisfy the 5 feet 6 inch height requirement. Two women whose names appeared lower on the list, but who satisfied the height requirement, were hired as police officers. All of the police officers hired, whether from the "integrated list" or the "all women list", were sworn in as police officers on the same date.

Plaintiff filed a charge of discrimination with the proper state and federal agencies, and the Massachusetts Commission Against Discrimination issued a finding of probable cause of discrimination against the city and State defendants. This action was commenced in the United States District Court for the District of Massachusetts under 42 U.S.C.§ 2000e-5(f). Plaintiff relied primarily on Title VII of the Civil Rights Act of 1964, using a disparate impact theory of discrimination.

Plaintiff introduced undisputed statistical evidence that the height requirement excluded about 80% of women between the ages of 18 and 34, while excluding only about 20% of men in that age group. Plaintiff alleged that the use of the height requirement discriminated against her on two separate occasions. The first time was when the "integrated list" was used, and the second time was when the "all-women list" was used. The trial judge found for the plaintiff in both instances, holding that the city had violated Title VII by its use of the height requirement as to both the "integrated list" and the "all-women list". Judgment entered for the plaintiff and it was ordered that she be promptly appointed as a police officer, and that back pay and attorney fees be awarded. It should be noted, however, that although the court concluded that the failure to appoint the plaintiff from the "integrated list" was a violation of Title VII, it resulted only in an "invalid appointment" because of her mistakenly high placement on that list. Therefore, while the court awarded back pay on the basis of

the city's failure to appoint the plaintiff from the "all-women list", it did not award the plaintiff lost wages and benefits as a result of the city's discriminatory failure to appoint the plaintiff from the "integrated list."

The city defendants did not appeal the trial court's judgment concerning the "integrated list", but they did appeal the judgment as to the "all-women list." In "*Costa I*" the Court of Appeals for the First Circuit reversed the district court's ruling that the plaintiff had failed to establish a prima facie case of discrimination. The court rejected the plaintiff's argument, which relied in part on the Second Circuit's decision in *Teal* v. *Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982), which held that the "bottom line" result of a hiring process was no defense to a Title VII discrimination action, nor did it prevent a plaintiff from establishing a prima facie case. *Id.* at 452. The Appeals Court in *Costa I* stated that "we do not follow the *Teal* approach. Absent any discriminatory purpose, we see no justification for looking behind a result that does not reveal a hiring that has a disproportionately adverse impact on the relevant minority labor pool." (A. 35.)

Shortly thereafter, this Court affirmed *Teal* and on motion of the plaintiff this court extended the time for filing a petition for certiorari in view of that decision (S.Ct. No. A-89). On rehearing, in light of this Court's opinion in *Connecticut* v. *Teal*, 457 U.S. 440 (1982), the Appeals Court in "*Costa II*" reversed its original appellate decision and reinstated the district court's judgment. The majority opinion in *Costa II* stated that:

> In this case the city applied the requirements to women only and hired only women. But this is no defense to a prima facie case of disparate impact discrimination. It seeks to justify the disparate effect of the rule in general by pointing to the end results of one particular application

of the rule. This is the "bottom line" approach which is proscribed by *Teal*.

(A. 17a.) In his concurring opinion, Judge Campbell stated that:

> [W]hile my personal views remain in accord with our original *Costa* opinion (and with Justice Powell's dissent in *Teal*), I am not persuaded that *Teal* is distinguishable. When the Supreme Court decides a case, I think we must ascribe a certain generality to its opinion; the present issue seems to me to be subsumed in principle, if not in every respect, by the language and holding in *Teal*. Accordingly I think we must affirm the district court.[1]

(A. 23a.)

Subsequently, on March 9, 1983, the Appeals Court granted a rehearing *en banc*. In "*Costa III*" the court reversed itself again and reaffirmed its original decision in *Costa I* reversing the district court's finding of discrimination. In the majority opinion in *Costa III*, the court held that the plaintiff had failed to establish a prima facie case of employment discrimination since:

> In this case, however, the evidence is uncontroverted that competition between men and women was at least temporarily suspended so that the city would hire two needed female police officers. Without the height requirement, the city would still have hired only two women. The

[1] In *Costa III* Judge Campbell has reversed himself and now believes that *Teal* does not apply.

> only difference is that plaintiff would have been one of them.

(A. 7a.) Judge Bownes, in a dissenting opinion, continued to adhere to his majority opinion in *Costa II*, stating that:

> The Court in *Teal* was not concerned with the employer's reason for including additional factors in its hiring process. The crucial issue for the Court was the employer's attempt to point to the end results (bottom line) of its hiring process to justify the discriminatory element. This is precisely what New Bedford is attempting in this case and what *Teal* prohibits.

(A. 9a.)

Reasons for Granting the Writ.

Certiorari should be granted in this case because the Court of Appeals for the First Circuit has incorrectly decided a substantial and important question in a way which is in conflict with the applicable decisions of this Court. Furthermore, the First Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I. Plaintiff Established a Prima Facie Case of Disparate Impact Discrimination by Making an Undisputed Showing that New Bedford's Use of the Height Requirement Excluded Far More Women than Men from the Opportunity to Become Police Officers.

There are two means to establish an employer's violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et*

seq.; disparate impact analysis, and disparate treatment analysis. In the instant case the courts below used disparate impact analysis to determine whether the ostensibly neutral height requirement was discriminatory and violated Title VII. Under disparate impact analysis, unlike disparate treatment analysis, a party need not show discriminatory intent by an employer. Instead, disparate impact analysis focuses on employment practices or requirements which, although fair in form, are discriminatory in operation. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). While disparate impact analysis and disparate treatment analysis are two different *means* by which to determine if a given employment requirement violated Title VII, both focus on the employment requirement in question and whether that requirement acts as an exclusionary barrier upon individuals within a protected group. See, *Connecticut* v. *Teal*, 457 U.S. 440 (1982); *Smith* v. *United Brotherhood of Carpenters*, 685 F.2d 164, 168 (6th Cir. 1982); *Equal Employment Opportunity Commission* v. *Greyhound Lines*, 635 F.2d 188, 198 (3d Cir. 1980) (dissent).

To establish a prima facie case of discrimination using disparate impact analysis the plaintiff must prove that the facially neutral employment requirement had a significantly discriminatory impact upon the protected group. *Connecticut* v. *Teal*, *supra* at 446. The district court properly found that the city defendants had violated Title VII by using an employment requirement which clearly had a disparate impact upon women by excluding far more women than men from employment opportunities, while being unrelated to job performance (A. 72a).

The city defendants concede, and the Appeals Court recognizes, that the plaintiff was denied appointment as a police officer solely because of her failure to meet the height requirement (A. 6a). Statistics introduced by the plaintiff at trial

established that the height requirement served to systematically exclude 80% of women, while excluding only about 20% of similarly situated men (A. 54a, 13a). As this Court has recognized, a plaintiff has never been required to base a statistical showing of disparate impact analysis on the characteristics of the actual applicants. On the contrary, the use of general population statistics is clearly appropriate to show the disparate impact of a given employment requirement when, as here, "there is no reason to suppose that physical height and weight characteristics (of the applicants) differ markedly from those of the national population." *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977).

This controlling statistical evidence is straightforward and irrefutable. It demonstrates not some theoretical effect that the height requirement has on women, but rather a very real discriminatory barrier that was posed to each and every female applicant for the position of police officer. It is clear then, that the plaintiff established a prima facie case of discrimination under Title VII, by proving that the height requirement had a significantly disproportionate impact upon women by excluding far more women than men from the opportunity to be employed as police officers. "But for" the discriminatory height requirement, plaintiff would have been appointed as a police officer from the "all-women list" (A. 72a).

II. The Court of Appeals' Decision in *Costa III* Conflicts with this Court's Holding in *Connecticut* v. *Teal* by Holding that the "Bottom Line" Results of New Bedford's Hiring Process Prevents the Plaintiff from Establishing a Prima Facie Case of Discrimination.

The Court of Appeals decision in *Costa III* is in conflict with this Court's decision in *Connecticut* v. *Teal*, 457 U.S. 440

(1982). In *Teal* this Court rejected the "bottom line" defense to a Title VII action based on disparate impact analysis, as the courts had earlier rejected a similar defense under disparate treatment analysis. See, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

In affirming the Second Circuit's decision in *Teal*, this Court rejected the employer's "bottom line" defense. The court held that where a pass-fail employment barrier or requirement classified far more blacks than whites as ineligible for employment, then that requirement violated Title VII even if the end result of the employment process (*i.e.*, the bottom line) was that a disproportionately large number of black candidates were promoted. *Connecticut* v. *Teal*, *supra* at 450-452.

To allow the "bottom line" defense the court held would be to ignore Title VII's clear emphasis on the *individual* and the individual's right to equality of employment opportunity. The Court stressed that "the statute speaks not in terms of jobs and promotion but in terms of *limitations* and *classifications* that would deprive any individual of employment opportunities." *Connecticut* v. *Teal*, *supra* at 448 (emphasis in original).

Thus, this type of facially non-discriminatory "bottom line" result does not prevent the plaintiff from establishing a prima facie case, nor does it offer a defense to the employer. *Id.* at 452. The proper focus for determining whether a plaintiff has established a prima facie case under disparate impact analysis is not, then, solely on the "bottom line" but rather on the employment requirement in question at any stage of the employment process, and that requirement's discriminatory effects. See, *Connecticut* v. *Teal*, *supra* at 450-451; *Smith* v. *Brotherhood of Carpenters*, *supra* at 168.

By proving that New Bedford's height requirement operated to exclude far more women than men from the opportunity to become police officers, the plaintiff established a prima facie

case of discrimination, despite the fact that the "bottom line" result of the hiring process in this one particular instance was the appointment of two other women.

III. The Majority Opinion in *Costa III* Mistakenly Distinguishes *Costa* from *Teal*.

As the dissent notes in *Costa III*, the majority opinion mistakenly distinguishes the case at bar from *Teal*, so as to hold that the plaintiff failed to establish a prima facie case (A. 9a). For several reasons, the court's attempt to distinguish *Costa* from *Teal* is seriously flawed.

To begin with, the *Costa III* court continues to ignore *Teal* by mistakenly focusing on groups and not on the individual, and the individual's right to employment opportunities. The court asserts that the plaintiff failed to demonstrate that the challenged barrier had a discriminatory effect (A. 6a). The court arrives at this conclusion by erroneously distinguishing the case at bar from *Teal* in that:

> Both cases involved a pass-fail hiring barrier that statistics demonstrated had a greater impact on members of the protected class than on non-members. Both also involved an *additional aspect* of the hiring process that operated to remove the impact of that barrier. . . . In *Teal* the initial discrimination was compensated for at the end; in *Costa* the separation of the hiring lists meant that there was no discrimination to begin with.

(A. 4a n.1.) (Emphasis added.)

This position ignores the fact that in neither *Teal*, nor in *Costa* is there, or can there be, an "additional aspect of the hir-

ing process that operate[s] to remove the impact of [the] barrier" upon the excluded plaintiffs. On the contrary, *Teal* is explicit in its holding that the discriminatory impact upon the individual of the discriminatory requirement cannot be removed by an additional factor. In particular, the "bottom line" result, even if that result is the appointment of a disproportionate number of individuals from the protected group, will not excuse the discriminatory barrier. In both *Teal* and *Costa*, *individuals* were denied an equal opportunity to compete because of a barrier that was statistically proven to impact significantly more harshly upon a protected group of which they are members. This Court recognized in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 708, 709 (1978) that:

> The statute [Title VII] makes it unlawful "to discriminate against any *individual*. . .." The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. . ..
>
> Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.

This Court reiterated this point in *Connecticut* v. *Teal*, *supra* at 455, stating that: "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."

In the final analysis there is no escaping the district court's finding that "but for" the discriminatory height requirement, the plaintiff, as an individual, would have been appointed as a police officer (A. 72a). The "bottom line" result of the hiring

process supplies the city with no defense to their violation of Title VII.

The second error that the court makes in *Costa III* is to attempt to distinguish *Costa* from *Teal* in that: "In *Teal* the initial discrimination was compensated for at the end; (while) in *Costa* the separation of the hiring lists meant that there was no discrimination to begin with" (A. 3a n.1). Upon further analysis it should be apparent that, contrary to the above statement, the compensatory factor, to the extent there can be one, appears subsequent to the "dirtywork" done by the discriminatory barriers in both *Teal* and *Costa*, and thus *Costa* is not distinguishable from *Teal* on this basis.

As the Appeals Court recognized, the "all-women list" was comprised simply of those women whose names appeared on the integrated list. In effect, "the most recent integrated list was therefore separated and the city hired the top two women on the women-only list who also met the 5 feet 6 inch height requirement" (A. 6a). By ostensibly separating the "integrated list", and *then* applying the height requirement to the "all-women list", the city defendants, in actuality, applied the height requirement to each and every applicant, male or female, on the "integrated list" and only then chose women in the order of their appearance on the "integrated list." To suggest that the height requirement was only imposed after the "separation" of the lists is to ignore the essential truth that the height requirement was applied to all applicants, both male and female. In reality, Linda Costa, and all other women applicants under 5 feet 6 inches were eliminated from the applicant pool the moment their names appeared on the "integrated list," at a time when they were in competition with *men* for the positions as police officers. Therefore, in *Costa*, as in *Teal*, the initial discrimination was "compensated" for [by the decision to hire two women] only *after* the discriminatory requirement had done its damage by disproportionately

excluding members of the protected group. This is the type of "bottom line" result that cannot prevent a plaintiff from establishing a prima facie case of discrimination under Title VII.

Lastly, the importance of the fact that the job of police officer was open to both men and women cannot be overemphasized. It is because men and women were in competition for the job of police officer that the height requirement disparately impacted upon women applicants, eliminating them from the competition for employment opportunities. Thus, put in the proper perspective, it is clear that the relevant job at issue was one of a set of police force jobs in general open to both men and women, and that the height requirement worked to disproportionately exclude women from that competition. (See A. 3a, where the court frames this issue.) A subsequent decision by the city to hire two women could not undo the discriminatory effect of the height requirement. On the contrary, the decision to hire two women from an all-female pool of applicants (derived from the "integrated list") only resulted in the plaintiff's again being denied employment because of the discriminatory height requirement.

Both the district court and Judge Bownes in his majority opinion in *Costa II* and his dissenting opinion in *Costa III* recognized that because the height requirement related to an employment position in which men and women were in competition, the fact that in one instance the applicant pool consisted solely of women, neither excused the disparate impact of the height requirement, nor prevented the plaintiff from establishing a prima facie case. The district court emphasized this in holding that:

> For this reason, even though the discrimination based on the height requirement in the particular instance of its application to the all-women list was among women only, *it was so intimately and integrally related to the broader*

> *use of the height requirement* that the contention that it was not a cause of legally cognizable harm to the plaintiff cannot be sustained.

(A. 73a.) (Emphasis added.) The Appeals Court in *Costa II* made this point even more directly, stating that:

> In this case the city applied the requirement to women only and hired only women. But this is no defense to a prima facie case of disparate impact discrimination. It seeks to justify the disparate effect of the rule in general by pointing to the end results of one particular application of the rule. This is the "bottom line" approach which is proscribed by *Teal*. *In light of* Teal, *we hold that when as here an employer uniformly applies a rule to male and female applicants and applies it in one round of hiring decisions to a pool of only female applicants, the rule must be job-related if in its regular application it has a disparate impact on women.*

(A. 17a-18a.) (Emphasis added.)

Both of the above decisions were correct in not reaching the issue of whether or not disparate impact analysis was applicable to a job classification restricted to one sex, since there was no need to reach that issue. See, *Gerdom* v. *Continental Airlines*, 692 F.2d 602, 605 (9th Cir. 1982). However, when as in *Costa*, a job is not restricted to one sex, but is open to both men and women, then the fact that in a particular round of the hiring process the applicant pool is limited to females, will not prevent a plaintiff from establishing a prima facie case of discrimination in the face of a discriminatory hiring requirement.

The majority opinion in *Costa III* continues to ignore this distinction, as can be seen by that court's emphasis on *Stroud*

v. *Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir. 1977), *cert. denied*, 434 U.S. 844, a case which dealt with a job classification which was by definition open *only* to women. Furthermore, although it arose in the context of disparate treatment analysis, this Court has rejected the reasoning in *Stroud* allowing a female plaintiff to be denied relief under Title VII because there are no similarly situated males. *County of Washington* v. *Gunther*, 452 U.S. 161, 178-179 (1981); see, also *Gerdom* v. *Continental Airlines*, *supra* at 607.

Conclusion.

As this Court has stated, "[w]e must . . . avoid interpretations of Title VII that deprive victims of discrimination of remedy without clear congressional mandate." *County of Washington* v. *Gunther*, *supra* at 178. The court in *Costa III* has improperly limited Title VII so as to deny a plaintiff who has been the victim of a discriminatory employment requirement the protection of Title VII. If this decision is allowed to stand, there will be significant adverse consequences for all victims of discriminatory requirements who have the misfortune of having that discrimination take place in the context of a portion of a hiring process that, for whatever reason, collusive or not, is limited to applicants who are members of a particular protected group.

For the reasons stated herein the petition for certiorari should be granted.

Respectfully submitted,

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On the Petition:
ROBERT M. SOLOMON.

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United States Court of Appeals
For the First Circuit

No. 81-1361.

LYNDA LeBOEUF COSTA,
PLAINTIFF, APPELLEE,
v.
JOHN A. MARKEY, ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT

Entered: May 23, 1983

This cause came on to be submitted on memoranda on petition for rehearing en banc on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: This Court's original decision of May 3, 1982 is reaffirmed. The part of the District Court's judgment relating to denial of employment from the all-women list of August 12, 1974 is reversed. No costs.

By the Court:

Francis P. Scigliano
Clerk.

United States Court of Appeals
For the First Circuit

No. 81-1361

LYNDA LEBOEUF COSTA,
PLAINTIFF, APPELLEE,
v.
JOHN A. MARKEY, ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT E. KEETON, *U.S. District Judge*]

BEFORE
COFFIN, *Chief Judge*,
CAMPBELL, BOWNES AND BREYER, *Circuit Judges*.

Armand Fernandes, Jr. for appellants.
Thomas F. McKenna for appellee.
Francis X. Bellotti, Attorney General, *Betty E. Waxman*, Assistant Attorney General, Government Bureau, Department of the Attorney General, and *Thomas A. Barnico*, Assistant Attorney General, Government Bureau, Department of the Attorney General, on brief, for State appellee.

OPINION EN BANC
MAY 23, 1983

COFFIN, *Circuit Judge*. This case has a long history. On May 3, 1982, we held that plaintiff could not prevail in her claim of employment discrimination based on a 5 feet 6 inches height requirement. Although the height requirement would, in other contexts, have a disparate impact on women, we determined that the height requirement could have had no such impact in this case because only women were in competition for the job. *Costa* v. *Markey* (*Costa I*), 677 F.2d 158 (1st Cir. 1982).

Subsequently, we agreed to rehear the case in light of the Supreme Court's decision in *Connecticut* v. *Teal*, 50 U.S.L.W. 4716 (U.S. June 21, 1982). After reviewing supplemental briefs and hearing oral argument, a majority of the panel determined that *Teal* required that we reverse our original position and allow plaintiff to recover based on her evidence that the height requirement would exclude more women than men, regardless of the fact that in this case the only job applicants were women. *Costa* v. *Markey* (*Costa II*), 694 F.2d 876 (1st Cir. 1982).

On March 9, 1983, we granted rehearing en banc. Counsel were requested to file supplemental memoranda addressing the question whether

> "this court [should] view the relevant job here at issue (1) as a single job open only to women or (2) as one of a set of police force jobs in general open to both men and women? If the latter, are not men and women in competition for the same jobs?"

For reasons set out below, a majority of the court now agrees that *Teal* does not require that we reverse our original determination that plaintiff has not made out a prima facie case of disparate impact. Nor are we persuaded by any other

factors regarding the hiring process at issue here that plaintiff was discriminated against on the basis of her sex. Accordingly, we reaffirm the judgment we rendered on May 3, 1982, denying plaintiff recovery.

I.

Plaintiff's initial argument before us relied in part on the Second Circuit's opinion in *Teal* v. *Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 50 U.S.L.W. 4716 (U.S. June 21, 1982), that Title VII plaintiffs may recover if they are disadvantaged by one component of a selection process that has a disparate impact on a protected group of which they are members, even if their employer "remedies" the disparate impact by subsequent affirmative measures. Since then, the Supreme Court has affirmed the *Teal* approach, holding that a nondiscriminatory "bottom line" is not a defense to a prima facie case of employment discrimination.

In *Costa I*, we specifically declined to follow the *Teal* approach. In a position similar to that of Justice Powell, dissenting in *Teal*, we concluded that if the overall effect of a hiring process is not discriminatory, we saw no reason to look behind that result to possibly discriminatory elements of the process.[1] We no longer have the liberty of offering that broad justification

[1] We also described *Teal* and the case before us as "mirror images", a description which has caused some confusion as this case has evolved. Use of the term was intended to highlight the differences rather than the similarities between the two cases. Both cases involved a pass-fail hiring barrier that statistics demonstrated had a greater impact on members of the protected class than on non-members. Both also involved an additional aspect of the hiring process that operated to remove the impact of that barrier. But there the similarity ends. They are mirror images and not identical situations because the aspects of the process that operated to remove the overall impact of the barrier were at different ends of the process. In *Teal* the initial discrimination was compensated for at the end; in *Costa* the separation of the hiring lists meant that there was no discrimination to begin with.

for our result in this case, but we can still point out that *Teal* and this case are distinguishable in at least one crucial respect. In *Teal*, the employer sought to remedy the effects of a discriminatory barrier by affirmatively hiring members of the disadvantaged minority group. In this case, although plaintiff was discriminated against on the basis of her height, there was *never* any discrimination of the type for which Title VII provides a remedy. Because the sexes were not in competition, the height requirement had no disparate effect on women. There was, therefore, no question of remedying the discriminatory effect of an element in a process with a non-discriminatory "bottom line".

A brief review of the facts should make the absence of discriminatory effect clear. The failure to hire at issue here arose from an effort in 1974 by the City of New Bedford, Massachusetts (city) to hire two female police officers. The city makes appointments for police officers from a list of eligible applicants that is certified to it by the state civil service personnel division. Applicants' names appear on the list in order of their scores on a written exam, adjusted for various statutory and court-ordered preferences. Ranking on the list is not affected by an applicant's height.

Prior to February 1974, the city had two distinct police categories: males were police officers and females were police women. Male applicants were ineligible for positions as police officers if they failed to meet a minimum height requirement of 5 feet 6 inches. In February, 1974, the city abandoned these separate job categories, and thereafter both men and women competed for positions as police officers. Women applicants were also required to meet the 5 feet 6 inches height requirement.

In the spring and summer of 1974, two female police officers retired. Because the city needed female officers to perform certain duties, related, for example, to female prisoners, and

because there were no women high enough on the integrated list to be hired, the city sought and received approval from the Massachusetts Commission Against Discrimination to hire from a list of exclusively female applicants. The most recent integrated list was therefore separated and the city hired the top two women on the women-only list who also met the 5 feet 6 inches height requirement. Although plaintiff's name appeared first on the list, she was rejected because she did not meet the height requirement.

Plaintiff brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, asserting that application of the height requirement was discriminatory because it had a disparate impact on women. The district court agreed with plaintiff and granted her back pay and other relief.[2] We reversed, concluding that if the height requirement was applied to women only, it could have had no disparate effect on women. Plaintiff, therefore, had failed to establish a prima facie case of employment discrimination.

After lengthy consideration, we are satisfied that our original reasoning was sound. Plaintiff simply failed to make it over the initial hurdle of demonstrating that the challenged barrier had a discriminatory effect on women. Absent a discriminatory effect, there is no need to engage in further inquiry regarding the employer's non-discriminatory "bottom line".

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[2] The district court also agreed that plaintiff had been discriminated against by an earlier application of the height requirement. During the integrated list period, plaintiff's name was incorrectly placed higher on the list than it should have been. Based on this placement, plaintiff was interviewed for a position as a police officer, but was rejected because of her height. The district court held that, although plaintiff was deprived only of an "invalid appointment" as a police officer, defendants nonetheless had violated Title VII. The court denied plaintiff back pay, but issued a declaratory judgment in her favor. Since neither party appealed this judgment, we have had no occasion to reconsider it.

Another plaintiff — perhaps one denied employment because of height a year after initiation of the separate lists — might be able to argue that because the job sought was that of a "police officer", the duties of which were basically the same for men and women, the sexes were in competition and the height requirement did have a disparate impact on women. In such a case, the city's height requirement might operate to exclude more women than men. In this case, however, the evidence is uncontroverted that competition between men and women was at least temporarily suspended so that the city could hire two needed female police officers. Without the height requirement, the city would still have hired only two women. The only difference is that plaintiff would have been one of them.

We are compelled to decide the case on the facts before us. On these facts, the height requirement cannot be viewed as having a disparate effect on women. In the absence of a discriminatory effect, *Teal* simply does not apply. *See Teal*, 50 U.S.L.W. at 4719 ("[a] non-job-related test *that has a disparate racial impact*, and is used to 'limit' or 'classify' employees, is 'used to discriminate' within the meaning of Title VII whether or not it was 'designed or intended' to have this effect and despite an employer's efforts to compensate for its discriminatory effect.") (Emphasis added.)

II.

Besides relying on *Teal*, plaintiff has an additional basis for challenging our decision in *Costa I*. In *Costa I*, we relied on a line of cases in which courts have refused, in the absence of competition between the sexes, to find that a facially neutral employment barrier discriminated against women on the basis of sex. *See, e.g., Stroud* v. *Delta Airlines, Inc.*, 544 F.2d 892 (5th Cir. 1977). Plaintiff suggests that subsequent authority

has cast doubt on the reasoning of those courts. Her argument, however, is unpersuasive. Neither *Gerdom* v. *Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982), nor *County of Washington* v. *Gunther*, 452 U.S. 161 (1981), found disparate impact where the sexes were not in competition. Both cases dealt with disparate treatment, the proof of which is not based on the effect on two competing groups of a facially neutral barrier, but on intentional discrimination against an individual because of his or her race or sex. We remain unpersuaded that a hiring barrier can have a disparate impact on a protected group when competition for the job is only among members of that protected group.

We reaffirm our original decision of May 3, 1982. The part of the district court's judgment relating to denial of employment from the all-women list of August 12, 1974 is reversed.

BOWNES, *Circuit Judge* (dissenting). I continue to adhere to my majority opinion in *Costa II*, 694 F.2d 876 (1st Cir. 1982), and briefly state why I think my brethren are wrong.

It seems clear to me that there were not two separate jobs at issue here; the city gave up its distinction between police officers and police women in 1974, prior to the employment decisions at issue here. Thus, the height requirement was uniformly applied to all male and female applicants for police officer positions.

Plaintiff established a prima facie case by showing that the height requirement acted more harshly on women than men. The city's attempt to defend on the basis of its hiring only women fails in light of *Connecticut* v. *Teal*, 50 U.S.L.W. 4716 (U.S. June 21, 1982). The final statistical outcome of a hiring process, according to *Teal*, is irrelevant in assessing the strength of a plaintiff's prima facie case. Rather, the analysis focuses on the step of the hiring process that plaintiff claims is discrim-

inatory; here, the height requirement. General population statistics are sufficient to determine whether a height requirement discriminates against women; there is no need for a plaintiff to resort to statistics that reflect the actual applicant pool. *See Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977).

The majority errs by focusing on the wrong aspect of *Teal*. It attempts to distinguish this case from *Teal* by pointing to the employer's motivation. In *Teal*, as the majority correctly notes, the employer included additional factors in its hiring process to compensate for one discriminatory element in that process. Here, the city's motivation for the second round of hiring was not to compensate for initial discrimination. This distinction, however, is of no moment. The Court in *Teal* was not concerned with the employer's reason for including additional factors in its hiring process. The crucial issue for the Court was the employer's attempt to point to the end results (bottom line) of its hiring process to justify the discriminatory element. This is precisely what New Bedford is attempting in this case and what *Teal* prohibits.

United States Court of Appeals
For the First Circuit

No. 81-1361.

LYNDA LeBOEUF COSTA,
PLAINTIFF, APPELLEE,

v.

JOHN A. MARKEY, et al.,
DEFENDANTS, APPELLANTS.

JUDGMENT

Entered December 3, 1982.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Dana H. Gallup, *Clerk.*

By: _____
Francis P. Scigliano,
Chief Deputy Clerk.

[cc. Messrs. Fernandez, McKenna & Barnico.]

United States Court of Appeals
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LYNDA LeBOEUF COSTA,
PLAINTIFF, APPELLEE,

v.

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DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT E. KEETON, *U.S. District Judge.*]

Before
COFFIN, *Chief Judge,*
CAMPBELL and BOWNES, *Circuit Judges.*

Armand Fernandes, Jr., for appellants.
Thomas F. McKenna, with whom *Mariann Zampano* was on brief, for appellee Lynda LeBoeuf Costa.
Francis X. Bellotti, Attorney General, *Betty E. Waxman*, Assistant Attorney General, Government Bureau, and *Thomas A. Barnico*, Assistant Attorney General, Government Bureau, on brief, for state appellee.

December 3, 1982

BOWNES, *Circuit Judge.* We granted the plaintiff's petition for a rehearing to examine the effect on this case of the Supreme Court's decision in *Connecticut* v. *Teal*, 50 U.S.L.W. (U.S. June 21, 1982). Because we find that *Teal* mandates a reversal of our prior opinion, we restate the relevant facts.

The New Bedford Police Department makes appointments for police officers from a list of eligible applicants that is cer-

tified to it by the state civil service personnel division. The lists at issue in this case were derived from a 1972 written examination for the position of police officer. Applicants' names appear on the list in order of their scores on the exam, adjusted for various statutory and court-ordered preferences. Plaintiff took the 1972 examination and was notified in 1973 that her score was 93.3 percent. She passed the city's physical fitness examination in May 1974.

Prior to February 1974 New Bedford had two distinct police categories: males were police officers and females were police women. Male applicants were ineligible for positions as police officers if they failed to meet a minimum height requirement of five feet six inches. In February 1974 the city abandoned these separate categories, and thereafter both men and women competed for positions as police officers. Women applicants were also required to meet the five feet six-inch height minimum.

In March 1974 a woman police officer retired. Because the city needed a female officer to perform special duties, related, for example, to female prisoners, it sought special permission from state authorities to engage in sex-specific hiring using a list of female applicants already certified for Taunton, Massachusetts. The Massachusetts Commission Against Discrimination authorized New Bedford's use of the Taunton list, but the state Division of Civil Service never certified the list to New Bedford.

The Division of Civil Service supplied New Bedford with an integrated list of male and female applicants on July 30, 1974, that was derived from the 1972 examination. Plaintiff's name was mistakenly omitted from this list, but was included on August 7, 1974, after the city was notified of the error. Her name, however, was incorrectly placed higher on the list than it should have been.[1] This error was corrected, but not

[1] Plaintiff's position on the list was based on the ranking of an applicant who not only had scored 93.3 percent on the examination, as plaintiff had, but also was a member of a racial minority to be accorded preference, which plaintiff was not.

until February 1975, well after the allegedly discriminatory acts occurred.

In August 1974 plaintiff was interviewed for a position as a police officer in New Bedford, but was rejected because she failed to meet the five feet six-inch height requirement. If her name had appeared in the correct place on the July 30 list, she would not have received the interview. Thus, application of the height requirement prevented plaintiff from obtaining a job as a police officer for which she was not eligible under the civil service requirements.

After an additional female police officer retired and use of the July 30 list did not result in the hiring of any women, New Bedford sought and received approval to hire from a list dated August 12, 1974. This list was derived from the July 30 list, but contained only the names of the female applicants. Plaintiff's name correctly appeared first on this list. Plaintiff, however, was again rejected because she failed to meet the height requirement. Two women who placed third and fourth on the list satisfied the height requirement and were appointed to positions as police officers. The woman appearing second on the list was also disqualified because of the height requirement.

Plaintiff brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, using a disparate impact theory of discrimination. Plaintiff alleged that New Bedford's use of the height requirement discriminated against her on two separate occasions: once, when the integrated list was used, and again, when the female-only list was used. We start with the integrated list. Plaintiff produced undisputed evidence that eighty percent of the male population is at least five feet six inches tall, while less than twenty percent of the female population reaches this height. The city defended on the basis of the incorrect placement of plaintiff's name on the applicant list for police officers. The

district court held that, although plaintiff was deprived only of an "invalid appointment" as a police officer, the defendants nonetheless had violated Title VII. The court denied plaintiff back pay, but issued a declaratory judgment in her favor. Neither party appealed this judgment.

As to the female-only list, the district court held that the second application of the height requirement also violated plaintiff's rights under Title VII and entitled her to back pay and other relief. The defendants appealed, and we reversed.

In our decision we concluded that because the height requirement was applied to women only there could be no disparate effect on women and hence no prima facie case of disparate impact discrimination. In so doing we rejected plaintiff's argument, which relied primarily on the Second Circuit's opinion in *Teal* v. *Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 50 U.S.L.W. 4716 (U.S. June 21, 1982), that the height requirement was one component of a selection process that excluded eighty percent of all women applicants and that this alone violated Title VII even though the overall result of the selection process was not objectionable. We explicitly declined to follow the Second Circuit's approach in *Teal*, and the Supreme Court's subsequent affirmance of *Teal* made this reconsideration necessary.

In *Connecticut* v. *Teal*, 50 U.S.L.W. 4716 (U.S. June 21, 1982), the Supreme Court considered "whether an employer sued for a violation of Title VII of the Civil Rights Act of 1964 may assert a 'bottom line' theory of defense." *Id.* at 4716. Under such a theory, an employer using an employment criterion that has an adverse impact on a group protected by Title VII can defend on the ground that the adverse impact is offset by other measures and the final result is an appropriately balanced work force. The Court held "that the 'bottom line' does not preclude [a plaintiff] from establishing a prima facie case, nor does it provide [an employer] with a defense to such a case." *Id.* at 4717.

In *Teal*, the plaintiffs, four black employees of the Department of Income Maintenance of Connecticut, sought to upgrade their positions from provisional to permanent Welfare Eligibility Supervisors. The first step in the promotion process was attainment of a passing score on a written examination. Failure of this test precluded an applicant from further consideration for promotion. Passing the test meant that the applicant moved on to later stages of the selection process in which the employer considered various other criteria, such as past work performance and recommendations of supervisors. Plaintiffs failed the written exam and brought suit alleging a violation of Title VII.

Plaintiffs produced evidence that the written examination had a significantly disparate effect on black candidates; the black passing rate was sixty-eight percent that of the white. The employer defended on the basis of the bottom line result of its promotion process. It argued that its additional factors in the promotion process, those considered once an applicant passed the written test, resulted in promotion of a greater percentage of black than white candidates.

Rejecting the employer's arguments, the Court explained that in determining whether the plaintiff had established a prima facie case under a disparate impact theory of discrimination the proper focus is not on the "bottom line" results of the hiring process, but rather on the particular step in the process alleged to have a discriminatory effect.

> In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.

Id. at 4719 (emphasis in original). Continuing on to a discus-

sion of its decision in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), a case concerning height and weight requirements for prison guards, the Court explained:

> Although we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on the "bottom line." We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment.

50 U.S.L.W. at 4719. The Court concluded that "[t]he suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria." *Id.* (emphasis in original).

Teal teaches that the proper place to evaluate the strength of a Title VII plaintiff's prima facie case of disparate impact discrimination is the point at which the employer's neutral criterion has a discriminatory effect. The Court's focus must be on the first step in the employment process that produces an adverse impact on a group protected by Title VII, not the end result of the employment process as a whole. When it is shown that an employer's rule disproportionately affects members of a class protected by Title VII, eliminating them from competition for an employment opportunity, the plaintiff establishes a prima facie case, and the burden shifts to the employer to show job-relatedness. The employer cannot point to the results of its process, but must justify use of the discriminatory element in that process.

Our original decision focused on the end result of New Bedford's hiring process. We reasoned that the height requirement could not have a discriminatory effect on women because the city, during this phase of its police officer recruit-

ment, hired only women. We explained that "[a]bsent any discriminatory purpose, we see no justification for looking behind a result that does not reveal a hiring that has a disproportionately adverse impact on the relevant minority labor pool." *Costa* v. *Markey*, 677 F.2d 158, 161-62 (1st Cir. 1982). *Teal* requires us, however, to look behind the result and evaluate the disparate impact of the height requirement itself, not the end result of its application in this particular case.

In the typical disparate impact case, two groups, one protected by Title VII and one not, are competing for employment opportunities. The employer applies a facially neutral rule to both groups, but the adverse results of the rule fall disproportionately on the group protected by Title VII. The sticking point here is that in this instance of the city's application of its height requirement women were excluded only relative to other women. While this may be used as a way to distinguish this case from *Teal*, we think to do so would evade *Teal*'s specific rejection of the "bottom line" defense.

Were we to focus in this case on the city's hiring of only women, we would be focusing on the "bottom line." It is undisputed that New Bedford's five feet six-inch height requirement resulted in far more women than men being classified as ineligible for appointment as police officers. The city routinely applied the height requirement to both male and female applicants. In this case the city applied the requirement to women only and hired only women. But this is no defense to a prima facie case of disparate impact discrimination. It seeks to justify the disparate effect of the rule in general by pointing to the end results of one particular application of the rule. This is the "bottom line" approach which is proscribed by *Teal*. In light of *Teal*, we hold that when, as here, an employer uniformly applies a rule to male and female applicants and applies it in one round of hiring decisions to a

pool of only female applicants, the rule must be job-related if in its regular application it has a disparate effect on women.

We realize that an argument can be made that *Teal* does not apply to a sex-specific list where men and women are not in competition for the same job because a plaintiff cannot establish a prima facie case if the result of the particular application of the employer's neutral rule only generates statistics about how women fared as compared to other women. Such an argument, however, overlooks the proper focus for examining the existence of a prima facie case. The Supreme Court has never required a plaintiff to use statistics from the actual application of a neutral rule when establishing a prima facie case.

> There is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. . . . [R]eliance on general population demographic data [is] not misplaced where there [is] no reason to suppose that physical height and weight characteristics of [one state's] men and women differ markedly from those of the national population.

Dothard v. *Rawlinson*, 433 U.S. 321, 330 (1977) (citations omitted). If there is reason to doubt the accuracy with which national statistics reflect the effect of the rule on the particular employer's labor pool, more narrowly tailored statistics may be required. *See New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 586 n.29 (1979). A case involving a height standard does not require resort to these more exacting statistics.

We hold that plaintiff has established a prima facie case of disparate impact discrimination by making an undisputed showing that New Bedford's use of its height requirement excluded far more women than men from competing for positions as police officers. Since the city did not seek to justify

its requirement by proving job-relatedness,[2] plaintiff has proven a complete violation of Title VII.

The final issue is relief. The parties have stipulated to the amount of back pay, interest, and attorney's fees and the seniority and wage level to which the plaintiff would be entitled if she prevails. The city defendants,[3] however, dispute whether plaintiff is entitled to back pay at all, the time from which back pay is to be computed, and if she is entitled to back pay, they argue that the state should be jointly liable for any award.

The defendants recognize and we agree that once a violation of title VII is proven, the successful plaintiff is presumptively entitled to back pay. *See City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 719 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). "The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 719. In particular, the district court is required to exercise its discretion in accord with the purposes of title VII. "[B]ackpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 421 (footnote omitted). The defendants claim that in this case two special circumstances exist to justify denial of a back pay award without frustrating the central purposes of title VII.

The first is reliance on a state statute. Defendants rely on a

[2] The height requirement rule has been eliminated.

[3] All further references to defendants are to the city defendants, the city officials of New Bedford. The state is also a party defendant.

line of cases, decided before *Albemarle*, in which the courts ruled that an employer's compliance with a state law designed to protect women, although a violation of title VII, was an important factor in determining whether the plaintiff was entitled to back pay. *See, e.g., Williams* v. *General Foods Corp.*, 492 F.2d 399, 407 (7th Cir. 1974); *Ash* v. *Hobart Manufacturing Co.*, 483 F.2d 289, 292-93 (6th Cir. 1973); *Kober* v. *Westinghouse*, 480 F.2d 240, 246-49 (3d Cir. 1973). The Supreme Court in *Albemarle* did not reach the question of whether reliance on female protective statutes provides an employer with a shield from back pay liability, *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 423 n.18, and although at least two circuit courts since *Albemarle* have stated that such reliance would be a factor in the equitable balancing at the remedy stage, *see Palmer* v. *General Mills*, 600 F.2d 595, 598-99 (6th Cir. 1979) (dictum); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 451 (7th Cir. 1976) (dictum), *cert. denied*, 433 U.S. 919 (1977); *contra Stryker* v. *Register Publishing Co.*, 423 F. Supp. 476, 477 (D. Conn. 1976), we need not decide this question in the present case.

In the line of cases to which defendants look for support, the state statutes in question unequivocally commanded the employer to treat women employees differently than male employees. Such a statute, for example, would place limits on the hours a woman could work or on the strenuousness of the tasks she could perform. In the typical case the employer was caught between the proverbial rock and a hard place. That is, it could comply with either the commands of title VII or the state statute, but not both. The courts reasoned that the employer should not be penalized with a back pay award when it relied in good faith on a valid state statute.

In this case, there is no statute that commanded New Bedford to adopt the height requirement. The statute to which defendants point only authorizes a city or town to adopt a

height requirement if it chooses to do so. *See* 1973 Mass. Acts ch. 351. The statute did not present New Bedford with the dilemma inherent in cases in which the state statute irreconcilably conflicts with title VII; such a conflict is the factor that tips the equitable balance in a defendant's favor.

The second special circumstance that defendants claim requires the court to deny back pay is their own good faith. We think that *Albemarle* prohibits a court from denying back pay solely on the basis of the employer's good faith. Although in *Albemarle* the Court ruled only that an employer's lack of bad faith is not a sufficient reason for denying back pay, 422 U.S. at 422, the factors the defendants used to show absence of bad faith are almost identical to those asserted here, and the Court's reasoning, therefore, is equally applicable here.

In *Albemarle* defendant's claim of no bad faith was based on its attempts to recruit minorities and its lack of knowledge that its seniority system violated title VII despite its disparate effect on blacks. Here, defendants contend that their good faith is demonstrated by their taking affirmative firm steps to hire women and their lack of intent to discriminate. Defendants, thus, in effect ask us to deviate from the holding that *Albemarle* compels.

We are not convinced that denial of back pay would not frustrate the purposes of title VII. Denying back pay on the basis of an employer's innocent intentions would make the remedy "a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII . . . ." *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 422. Moreover, too close an "emphasis on the employer's aspirations and intentions accords too little weight to the legal standards that govern under Title VII. The Act focuses on effects, not purposes." *Cohen* v. *West Haven Board of Police Commissioners*, 638 F.2d 496, 504 (2d Cir. 1980). Were we to deny back pay here we would eliminate an

important incentive for employers to undertake self-examination of their employment practices and discard those that have an illegal discriminatory effect.

Defendants next claim that their back pay liability was cut off as of the date of their subsequent offer to place plaintiff on the police force if she met the applicable civil service regulations. Plaintiff argues, first, that any offer was not "bona fide" because it was necessarily conditioned on plaintiff's obtaining a place on a civil service list, a factor the city could not control, and second, that she was not obligated to accept the offer because it did not include back pay and retroactive seniority. The Supreme Court's recent decision in *Ford Motor Co.* v. *EEOC*, 50 U.S.L.W. 4937 (U.S. June 28, 1982), controls our disposition of this issue.

In *Ford Motor Co.* the Court held that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability," *id.* at 4943, and that an employer's failure to include in the offer retroactive seniority or back pay does not make the offer unconditional and is not a special circumstance justifying rejection. *Id.* at 4938 n.7, 4940-43. From our examination of the record we are unable to discern the exact date on which the city made an offer to plaintiff and whether the offer was unconditional as defined in *Ford Motor Co.* We must therefore remand to the district court so that it can determine the amount of back pay due in the light of *Ford Motor Co.*

Finally, we uphold the district court's limitation of the back pay award to the city defendants only. The single act of discrimination that led to an award of back pay was the application of the height requirement to plaintiff during competition involving the all-women list. As we noted earlier, the city's adoption of the height requirement was completely voluntary. Although the state *permitted* an individual city to adopt a height requirement, it in no way compelled New Bed-

ford to do so, and it clearly did not mandate adoption of a requirement that violated title VII. In short, neither the plaintiff nor the city produced any evidence that the state was responsible for the discrimination at issue.

Our prior opinion finding no liability is reversed, and the case is remanded for further proceedings consistent herewith.

CAMPBELL, *Circuit Judge* (Concurring). I concur in the analysis of the court. While Chief Judge Coffin points out certain differences between *Teal* and this case, and while my personal views remain in accord with our original *Costa* opinion (and with Justice Powell's dissent in *Teal*), I am not persuaded that *Teal* is distinguishable. When the Supreme Court decides a case, I think we must ascribe a certain generality to its opinion; the present issue seems to me to be subsumed in principle, if not in every respect, by the language and holding in *Teal*. Accordingly I think we must affirm the district court.

COFFIN, Chief Judge (dissenting). This case seems to me unlike most cases resulting in a divided panel. Instead of a head-on clash of arguments (there is/is not probable cause, sufficient evidence, due process, etc.), the difference between my brothers and me lies in our choice of a starting point. I insist that, because there has been no discrimination against women in the process of filling the positions at issue here, there is no prima facie case to begin with. My brothers' position has to be that although women have not been discriminated against, the use of a criterion of choice — height — which in *other* circumstances *can* be a means of discriminating against women, is sufficient to make out a prima facie case here. Because this seems to me to provide a remedy when there has been no wrong and to carry abstract disparate impact analysis far beyond that articulated in *Connecticut* v. *Teal*, ____ U.S. ____, 102 S. Ct. 2525, 50 U.S.L.W. 4716 (U.S. June 21, 1982), I dissent.

At the outset, I must assume some responsibility for what I consider to be current confusion as to the relationship between the situation in this case and that in *Connecticut* v. *Teal*. In our first opinion, *(Costa I)*, I described *Teal* as the "mirror image" of this case and specifically declined to follow the *Teal* approach. In part because of that language I agreed that in light of the Supreme Court's affirmance of *Teal* we should rehear this case and make sure that the two cases differ significantly. I think they do.

The plaintiff in this case had urged us to accept the Second Circuit's opinion in *Teal* as guidance for our resolution of her claim. We could (and perhaps should) have dismissed *Teal* as simply irrelevant to a situation where the challenged barrier never had any disproportionate effect on women. Instead, we described the cases as "mirror images", a description which has caused no small amount of confusion and which I feel some obligation to attempt to clarify. In describing *Teal* as the mirror image of this case, I meant to highlight the differences rather than the similarities between the two cases. Both cases involved a pass-fail hiring barrier that statistics demonstrated had a greater impact on members of the protected class than on non-members. Both also involved an additional aspect of the hiring process that operated to remove the impact of that barrier. But there the similarity ends. They are mirror images and not identical situations because the aspects of the process that operated to remove the overall impact of the barrier were at different ends of the process. In *Costa* there was no discrimination to begin with; in *Teal* the initial discrimination was compensated for at the end. That timing is a crucial distinction between the two cases because, as we pointed out in *Costa I*, the initial decision in this case to hire only women meant that the pass-fail barrier never had any disparate effect on women. There was, therefore, no question of remedying the discriminatory effect of an element in a

process with a non-discriminatory bottom line. There was never any discriminatory effect.[1]

As I understand the debate between the majority and the dissent in *Teal*, the issue was whether an employer should be excused for utilizing a barrier that statistics showed disproportionately affected blacks as long as it added enough blacks at the end of the hiring process to meet the appropriate racial ratio. The majority concluded that a non-discriminatory "bottom line" was no justification for discriminating against individuals along the way. They found it "clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." 50 U.S.L.W. at 4720. In Justice Powell's view, the result reached by the majority is an unprecedented expansion of the theory of disparate impact. As he points out, Title VII plaintiffs have been allowed to proceed under either a theory of disparate treatment — by establishing that they, as individuals, have been discriminated against — or of disparate impact — by establishing that they have been victims of a facially neutral practice that excludes a disproportionate number of members of his protected group. Because the latter theory necessarily requires reference to the group rather than to the individual, Justice Powell would not allow a plaintiff proceeding under this theory to "have it both ways", to

[1] In *Costa I*, we also described *Teal* as standing for an approach to reviewing disparate impact discrimination claims that we rejected. In a position similar to that of Justice Powell, dissenting in *Teal*, we concluded that if the overall effect of a hiring process is not discriminatory, we saw no reason to look behind that result to possibly discriminatory elements of the process. We no longer have the liberty of offering that broad justification for our result in this case, but we can still point out that *Teal* and this case are different in the crucial respect that the challenged hiring barrier in one had a disparate effect on women and that in the other did not. Nothing in *Teal* requires us to find a discriminatory effect where there is none.

infer discrimination by reference to the group and then ignore the fact that the group as a whole has not been injured. In his view, this is "to confuse the individualistic aim of Title VII with the methods of proof by which Title VII rights may be vindicated." *Id.* at 4721 (Powell, J., dissenting).

Whatever the merits of the dispute in *Teal*, neither side addressed the issue raised by plaintiff here. My brothers, I submit, have made a leap beyond the position taken by the majority and criticized by the dissent in *Teal*. For, as far as I can tell, the Supreme Court has never held, or even intimated, that a Title VII plaintiff should be able to recover for discrimination on the basis of her sex when it is impossible that she was disadvantaged in relation to any man. We held in *Costa I*, and my brothers still agree, that at the only point in time when the height requirement had any effect on plaintiff, she was in competition only with other women for a job as a police officer.[2] As we pointed out in *Costa I*, courts that have addressed similar situations agree that when there is no competition between the sexes, there can be no discrimination on the basis of sex. *See Stroud* v. *Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir. 1977); *Gerdom* v. *Continental Airlines, Inc.*, 648 F.2d 1223 (9th Cir. 1981).

The majority reasons that "[w]ere we to focus in this case on the city's hiring of only women, we would be focusing on the 'bottom line' ", a focus forbidden by *Teal*. To the contrary, I submit that in this case, the city's hiring of only women is the introductory paragraph. It is the key to

[2] It has not been argued and there is no evidence that the relative numbers of men and women hired would have varied according to the number or quality of the eligible women applicants. The City requested permission to hire from a list of women because of its need for female police officers and the fact that, wholly apart from the height requirement, there were no women high enough on the integrated list to be hired. Thus it is doubtful that after the lists were separated the number of women hired would have increased had there been no height requirement.

everything else that follows. According to *Teal*, once a disparate effect is demonstrated, no amount of undoing of that effect will suffice. In this case, there is no effect, so we need not worry about the employer's "bottom line".

My dispute with my brothers, I believe, comes down to what is required for a plaintiff to demonstrate disparate impact. I have no question that in another context, where the sexes are in competition, the statistics provided here, showing that as of 1971-74 the average height of women between the ages of 25 and 34 was 5 feet, 4.1 inches while that for men in the same age bracket was 5 feet, 9.6 inches, would establish a prima facie case of disparate impact and require an employer to demonstrate that his height requirement was job related. My point in *Costa I* and the point which I reiterate here is that the fact that a hiring barrier excludes more women than men is irrelevant when the women cannot lose out to men. When only women are competing for a job as a police officer, a height requirement may be unfair but it is not a violation of Title VII.

United States Court of Appeals
For the First Circuit

No. 81-1361.

LYNDA LeBOEUF COSTA,

PLAINTIFF-APPELLEE,

v.

JOHN A. MARKEY, et al.,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. ROBERT E. KEETON, *U.S. District Judge.*]

Before

COFFIN, *Chief Judge,*

CAMPBELL and BOWNES, *Circuit Judges.*

Armand Fernandes, Jr., for appellants.

Thomas F. McKenna, with whom *Mariann Zampano* was on brief for appellee.

Thomas A. Barnico, Assistant Attorney General, Government Bureau, Department of the Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Betty E. Waxman*, Assistant Attorney General, Government Bureau, Department of the Attorney General, were on brief, for the State appellee.

May 3, 1982

COFFIN, *Chief Judge.* The interesting question at the heart of this appeal is whether the authorities of New Bedford engaged in sex discrimination when they hired police officers from an all-women pool from which the female plaintiff was excluded because she was below the required minimum height of 5 feet, 6 inches.

Plaintiff's action was brought against the mayor, chief of police, and city councillors of New Bedford and the personnel

administrator and Civil Service Commission of the Commonwealth of Massachusetts. The district court denied relief sought under 42 U.S.C. §§ 1981, 1983, and the Equal Protection clause of the Fourteenth Amendment, but granted retroactive relief in the form of back pay and other benefits for the city's violation of section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The city challenges both the finding of discrimination and the conclusion that the Commonwealth defendants were not jointly and/or severally liable with the city defendants.[1]

The presently critical facts are few. In 1974 New Bedford abolished its separate hiring procedures for "policewomen" and "police officer" and used an "integrated" candidate list for "police officer" prepared by state civil service. Early in that year, a recently adopted 5 feet, 6 inches height requirement was extended to apply to women as well as to men. Plaintiff, 33 years old and 5 feet, 3 inches tall, took her police civil service examination in 1972, was notified in 1973 that her score was 93.3 per cent, and in May, 1974, passed the city's physical fitness examination. On July 30, 1974, the use of an integrated list of men and women, ranked by civil service to reflect examination scores and statutory and court ordered preferences, failed to result in the appointment of any female.[2]

[1] The plaintiff presently serves on the police force with seniority and pay calculated in accordance with the district court's finding that she had been improperly deprived of employment at the time of the hiring from the height-restrictive all-women pool. In the event this court finds no violation of Title VII, plaintiff is to retain her position but her pay and seniority are to be calculated on the basis of the date of her actual appointment.

[2] This end result followed a drama, if not a comedy, of errors in which, first, plaintiff's name was erroneously left off the list, second, her name was restored to the list at an erroneously higher position than her various qualifications merited, and, third, after an interview (which she should not have had) she was rejected because of failure to meet the height requirement. The district court's ruling that this rejection did not cause cognizable harm because any appointment of plaintiff would have been invalid, is not contested.

New Bedford, having a continuing need for a female police officer, *e.g.*, to attend to female prisoners and to investigate cases involving females, sought and received permission from the Massachusetts Commission Against Discrimination to make a gender-specific hiring. To implement this action, it also received, on August 12, an all-women list. Plaintiff, although placing first on the list, was rejected because of her height. All height requirements were abolished in November, 1974. The evidence before the court, in addition to these facts, included national statistics showing that as of 1960-1962 80 per cent of women between 18 and 34 were shorter than 5 feet, 6 inches, and that as of 1971-1974 the average height of women between the ages of 25 and 34 was 5 feet, 4.1 inches while that for men in the same age bracket was 5 feet, 9.6 inches.

The district court specifically found that the height requirement had not been adopted "because of" a purpose to discriminate against women. It therefore addressed the Title VII issue as one involving a presumptively neutral test which results in a disparate impact, without requiring proof of a discriminatory purpose. *Albemarle Paper Co.* v. *Moody*, 442 U.S. 405, 425 (1975). The court found that plaintiff's statistics established "the significantly disparate impact of a 5 feet 6 inches minimum height requirement upon women as compared to men." This, so the court concluded, made out plaintiff's prima facie case which was unrebutted. The court therefore found the height requirement invalid because it was "so intimately and integrally related to the broader use of the height requirement" and because "but for application of the height requirement to the selection from the all-women list, plaintiff would have been on the police force under a valid appointment."

The precise issue before us is whether the district court was correct in concluding that plaintiff had established a prima

facie case under the statute. The statute, 42 U.S.C. § 2000e-2(a), states, in essence, that it is an unlawful practice for an employer "(1) to . . . refuse to hire . . . any individual . . . because of such individual's . . . sex . . .; or (2) to . . . classify . . . applicants for employment in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's . . . sex . . . ." A prima facie disparate impact case under the statute requires a demonstration by plaintiff that the employee selection restriction selects "applicants for hire . . . in a [sexual] pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody, supra*, 442 U.S. at 425.

Defendants argue in essence that plaintiff was excluded, not because she is a woman but because she is short. The criterion of height, of course, does operate to exclude more women than men when the two sexes are in competition. It is then a built-in trigger of discrimination. But, they contend, the fact that the pool of applicants is limited to women operates as a safety lock, preventing the trigger from achieving its ordinarily discriminatory end result. The end result here, the filling of the two available job openings from the August 12 list with women only, cannot be said to produce a sexual pattern significantly less representative of women than is the pool of persons interested in joining the New Bedford police force. Thus, say defendants, plaintiff has not established a prima facie case. Plaintiff finds this analysis simplistic. She emphasizes the fact that she, an individual woman, never had a chance to compete because of a pass-fail threshold height requirement that is more adverse in its impact on women than it is on men.

In assessing these positions, we think that an analogy may point up the issue more sharply. If a private employer maintained a branch drug store which he wished to man with all-black personnel and if he, quixotically, wished all his person-

nel to be college graduates, could it be successfully argued that he violates Title VII by carrying out his plan? The college graduate requirement, if applicable where whites and blacks are in competition, would bear much more harshly on blacks, but not where only blacks are to be hired. In both cases there are several layers of analysis. On the surface each applicant is excluded from a job opportunity because of a neutral factor — height or education. To this the short female and non-college black person respond that each supposedly neutral factor actually is an indicium of their minority, since it in fact usually operates to prefer males or whites. But when we probe one layer deeper, we conclude that this is an inadequate response. The height or education factor does its dirty work only when there are males or whites to prefer. Absent this role of disproportionate preferment, the factor no longer distinguishes between sexes or races, but only within the sex or a race. The taint is not inherent in the factor, but contextual. *Alterat contextus, cessat ipsa lex.* In sum, we accept defendants' reasoning.

The relevant case law heavily supports this reasoning. An important line of cases is led by *Stroud* v. *Delta Air Lines Inc.*, 544 F.2d 892 (5th Cir. 1977), which upheld the validity of an airline's no-marriage rule for its all-women group of flight attendants. The court reasoned:

> "Here, plaintiff is not a member of one of the relevant, identifiable classes which has been discountenanced in favor of another such class. Rather, certain women — stewardesses who are unmarried — are favored over certain other women — stewardesses who are married. As one of the all-female group of flight attendants employed by Delta, plaintiff suffered a discrimination, but it was based on marriage and not sex. Men were not favored over women; they simply were not involved in the functioning of the policy." *Id.* 544 F.2d at 893.

See also DeVolld v. *Bailar*, 568 F.2d 1162, 1163-64 (5th Cir. 1978) (promotion of one Mexican-American removes any possibility that the plaintiff can prove that her situation is due to discrimination against her as a Mexican-American).

Plaintiff attempts to distinguish these cases as generally involving discharge standards which did not automatically exclude 80 per cent of the available female applicant pool. This does not seem persuasive to us. Although particular lawsuits involving such rules as no-marriage may have arisen in a discharge context, the rule itself effectively excludes married women from applying.

Plaintiff relies heavily on a case in which the court held that black plaintiffs had made out a prima facie case by showing that one component of a selection process for promotion to Welfare Eligibility Supervisor, a written examination, had a disparate impact on them and operated as a pass-fail barrier to their further consideration, notwithstanding the fact that the total selection process did not have a disparate impact on black candidates. *Teal* v. *Connecticut*, 645 F.2d 133 (2d Cir. 1981) *cert. granted*, 50 U.S.L.W. 3244 (October 6, 1981).[3]

In *Teal* plaintiffs sought to gain permanent status as supervisors. They first had to pass a written examination. From

[3] We note our discomfiture at learning only by our own research, after oral argument in March, 1982, of the granting of certiorari five months earlier. The question presented is:

> "In Title VII action in which final outcome of employee selection process does not result in adverse impact against plaintiffs' minority group, can plaintiffs make prima facie showing of employment discrimination by merely establishing: (1) that they failed to succeed on component of selection process and thereby became ineligible to proceed further in selection process, and (2) that results of such component had disparate impact on plaintiffs' minority group?" (50 U.S.L.W. 3054).

This is really the mirror image of the case before us. In *Teal* and other such cases, *see infra*, the defusing of disparate impact came at the end of the selection process; in the instant case the initial decision to hire only women made defusing unnecessary.

the resulting eligible pool the appointing authority considered past performance, recommendations of supervisors, seniority, and, not least, affirmative action considerations. This particular examination resulted in a pass rate for black candidates that was only 68 per cent that of white candidates. Yet the final result was a promotion rate of 23 per cent of the black applicants and 13.5 per cent of the white applicants.

The case followed and overruled *Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256 (D. Conn. 1979), in which, as in most other similar cases up to that time, the court, in examining for disparate impact, had looked at the selection process as a whole, rather than any particular stage or segment.[4] *Brown's* two compelling reasons had been the palpable problems of court management if courts were to examine "subtests, sub-subtests, and even individual questions", *id.* at 1262, and its concern that Title VII not be construed to prevent a municipality's resorting to affirmative action to *guarantee* a fit between minority hiring and the minority applicant pool, not leaving matters entirely to the random workings of a non-discriminatory selection process.

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[4] The *Brown* court's comprehensive catalogue of authorities pursuing this approach is as follows:

> "*Friend* v. *Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978), *aff'g* 446 F. Supp. 361 (E.D. Va. 1977); *Rule* v. *Ironworkers Local 396*, 568 F.2d 558, 565, n.10 (8th Cir. 1977); *Smith* v. *Troyan*, 520 F.2d 492, 497-98 (6th Cir. 1975); *Lee* v. *City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978); *cf. Kirkland* v. *New York State Department of Correctional Services*, 374 F. Supp. 1361, 1370 (S.D.N.Y. 1974), *aff'd in relevant part*, 520 F.2d 420, 425 (2d Cir. 1975) (showing that overall examination procedure has disparate results cannot be rebutted by fragmenting process and showing no disparate results in separate parts); *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Commission*, 360 F. Supp. 1265, 1272 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) (same). *Contra, Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372-73 (5th Cir. 1974); *League of United Latin American Citizens* v. *City of Santa Ana*, 410 F. Supp. 873, 894-95 (C.D. Cal. 1976)." 474 F. Supp. at 1261. (Footnote omitted).

In overruling *Brown*, the *Teal* court reasoned that the overview-of-the-whole-process approach is justifiable only where each candidate's total score is made up of negative (disparate impact) and positive (affirmative action) factors in equipoise. All candidates would share in both burdens and offsetting benefits. But, the court concluded, if there is a discriminatory pass-fail barrier that excludes individuals from an opportunity to be later evaluated, belated "corrective" action is of no avail. 645 F.2d at 139.

As our previous discussion would indicate, we do not follow the *Teal* approach. Absent any discriminatory purpose, we see no justification for looking behind a result that does not reveal a hiring that has a disproportionately adverse impact on the relevant minority labor pool. Beyond this, there are prudential problems in trying to distinguish between a selection process which is based on cumulative scores and one which involves a pass-fail threshold followed by other selection steps. As a comment in 23 Boston College Law Review, Dec. 1981, Annual Survey of Labor Law 84, 278-279 puts it:

> "In its discussion of the *Brown* case, the *Teal* court did not address Brown's statement that '[e]ven in a cumulatively scored application process, a score on any single component might be so low as to preclude the accumulation of a total score meeting a minimum hiring requirement.' 474 F. Supp. at 1262, 20 FEP Cas. at 1380. In light of that observation, it is evident that the distinction between the two types of selection processes is not so neat . . . . Furthermore, it is only on the basis of the existence of the distinction that the *Teal* court dismisses the concern that courts will be burdened excessively by examining isolated sub-tests. 656 F.2d at 139, 25 FEP Cas. at 533. . . . The court fails to explain convincingly why the burden of examining sub-tests is lighter in the process with a pass-fail barrier."

We therefore conclude that the district court erred in deeming that the men-women height statistics established a prima facie case under the circumstances we have described. So concluding, we need not decide other issues.

It is perhaps worth emphasizing what we have not held or intimated. First, we have not dealt with a selection process that uses a facially neutral requirement in circumstances belying the good faith of the employer. For example, if it were the case that rather extreme requirements were set with the result that positions nominally reserved for women were seldom filled and then only after inordinate delay, this would involve disparate treatment analysis and the concomitant need, easily met, to prove discriminatory purpose.

Second, this case does not deal with an equal protection challenge against a height restriction on behalf of short women, where there is proof that the employer devised the requirement "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group. [Footnote omitted.]" *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

Third, this is not a case where the selection process incorporated criteria that were so demeaning to women as to constitute institutionalized harassment. *Cf. Tomkins* v. *Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 n.1 (3d Cir. 1977) [court does not pass on theory that sexual harassment created "an environment of debilitating sexual intimidation"]; *and Bundy* v. *Jackson*, 641 F.2d 934 (D.C. Cir. 1981) [sexual harassment even without adverse employment consequences, can be a violation of Title VII, in that it creates a "discriminatory environment"].

Finally, this is not a case where there is evidence that replacing one female with another was to cover up a discriminatory act. *See Equal Employment Opportunity Commission* v. *Tufts Institution of Learning*, 421 F. Supp. 152, 165 (D. Mass. 1975).

The part of the judgment relating to denial of employment from the all-women list of August 12, 1974 is accordingly reversed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LYNDA LeBOEUF COSTA,	:	
PLAINTIFF	:	
	:	C. A.
v.	:	No. 75-2915-K
	:	
JOHN MARKEY, et al.,	:	
DEFENDANTS	:	

April 24, 1981

FINAL JUDGMENT

I. *Appointment*

A. David Marchand, Personnel Administrator of Division of Personnel Administration, as successor to defendant Anne Ramsey, shall revive the all-woman list of police officers certified in 1974 to the City of New Bedford, said list consisting of the name of Lynda LeBoeuf Costa, subject to her passing a physical examination administered by the Division of Personnel Administration.

The Personnel Administrator will notify the members of the Massachusetts Civil Service Commission that it is requesting the revival of an eligibility list containing the plaintiff's name (Lynda LeBoeuf Costa) pursuant to St. 1976, c. 539.

B. The current members of the Massachusetts Civil Service Commission, as successors to those named in LeBoeuf v. Markey, shall approve the revival of the list pursuant to St. 1976, c. 534 and shall notify the Personnel Administrator of said approval.

C. Upon approval, the administrator forthwith shall certify the name of Lynda LeBoeuf Costa to the City of New Bedford for appointment as a police officer.

D. The City of New Bedford and its officials and agents shall promptly appoint Lynda LeBoeuf Costa as a police officer of the New Bedford Police Department within ten (10) days of her certification by the Personnel Administrator.

E. Plaintiff shall be placed in the status for current and future pay that she would have occupied had she been appointed on September 22, 1974 with Jeanne Lawrence and Shirley Arsenault.

F. Except as hereinafter stated, plaintiff shall be given full seniority privileges as if she had been appointed on September 22, 1974 immediately prior to Jeanne Lawrence and Shirley Arsenault. These privileges include, but without limitation, election of vacations, number of vacation weeks, transfer rights and bidding rights. However:

1. Plaintiff shall not accrue retroactive seniority for purposes of eligibility for promotional exams (Mass. Gen. Laws c. 31, § 59).

2. Until the plaintiff has completed three (3) months' recruit training pursuant to applicable state law, plaintiff will be required to be assigned to limited (inside) duty.

3. Following completion of said recruit training, plaintiff will comply with the Union contract provision which now requires all new recruits to be first assigned to the Uniform Patrol Division Nights for three (3) years subject, however, to all bidding rights which she will have based on seniority as stated above.

4. Upon appointment, plaintiff shall be required to satisfactorily complete training at a police academy (Mass. Gen. Laws c. 41, § 96B) and serve a probationary period (Mass. Gen. Laws c. 31, § 61) before her appointment becomes permanent.

5. Plaintiff will be credited with fifteen (15) days of sick leave.

G. The Court shall retain jurisdiction of this matter during plaintiff's probationary period.

II. *Back Pay*

A. The City Defendants shall pay the Plaintiff back pay from September 24, 1974 to February 28, 1981, the sum of Twenty Five Thousand Three Hundred Fifty Four and 12/100 ($25,354.12) dollars.

B. The City Defendants shall pay the Plaintiff the sum of $7,028.11 as interest on the back pay of eight (8%) percent per annum through February 28, 1981, plus interest at eight percent (8%) per annum on $25,354.12 from that date to the date of this order.

C. City Defendants shall deduct five percent (5%) of the total sum awarded as back pay (pursuant to Paragraph 11A of this order) as the plaintiff's employee's contribution to the City Defendant's Retirement Program administered in accordance with state law and the City shall contribute any sums required to be deposited by it in accordance with said program.

III. *Attorney's Fees*

Subject to the stipulations made and referred to in Paragraph IV.A. herein, the City defendants shall pay the plaintiff attorney's fees for the period through February 28, 1981 in the amount Eleven Thousand ($11,000.00) dollars.

IV. *Stipulations*

A. The parties have stipulated as to the amount of back pay, interest and attorney's fees through February 28, 1981. However, City and State defendants have reserved the right to appeal on all issues raised during the trial. These issues include, without limitation: the underlying issue of discrimination; the locus of responsibility for such discrimination, City

and/or State; the award of back pay, interest and attorneys fees, and responsibility for payment of such award by City and/or State defendants.

B. Pending any appeal filed by either the City and/or State defendants, the City with the approval of the State defendants, has tendered to the plaintiff the position of police officer for the City in the status for current pay that she would have received and occupied had she been appointed on September 24, 1974 with Jeanne Lawrence and Shirley Arsenault. The plaintiff has now accepted this tender.

C. In the event an appellate court rejects the order of appointment to the position of police officer under the terms of the Final Judgment, the parties have agreed to retain the plaintiff in the position of police officer at a rate of pay and level of seniority effective as of the actual date of her appointment.

Robert E. Keeton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LYNDA LeBOEUF COSTA,	:	
PLAINTIFF	:	
	:	C. A.
v.	:	No. 75-2915-K
	:	
JOHN MARKEY, et al.,	:	
DEFENDANTS	:	

December 4, 1980

Memorandum and Order

The matters before the court are issues relating to the terms of judgment consistent with the rulings of the court in the Memorandum and Order of September 16, 1980, and determinations to be made at this time on remaining issues, in light of additional submissions of the parties.

I.

Plaintiff argues that the state defendants, along with the city defendants, should be held jointly and severally liable for both back pay and attorneys fees. In the Memorandum and Order of September 16, 1980, however, the court concluded that the sole basis for awarding back pay was denying plaintiff appointment from the All-Women List by the city defendants' application of a city-determined minimum height requirement. No basis was found, and none is now found, for holding state defendants accountable for this action of the city defendants. 42 U.S.C. § 2000e-5(g) provides that a back pay award is "payable by the employer, employment agency or labor organization . . . responsible for the unlawful employment practice." Even if state defendants were considered to be within the group subject to liability for back pay, they are

not, on the evidence and findings of the court in this case, among those "responsible" for the improper employment practice by reason of which back pay is awarded. *Cf. Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641, 656 (5th Cir. 1974). Plaintiff's request that state defendants be held jointly and severally liable for the award of back pay is denied.

State defendants are appropriately made parties to the order for equitable relief allowed the plaintiff. They must take actions consistent with the court's order to make the equitable relief fully effective. This need for their presence as parties, however, is not in itself a sufficient ground for awarding plaintiff's attorney's fees against state defendants. The central basis for both the back pay award and the equitable relief allowed in this case is the improper application of the height requirement by city defendants. Insofar as plaintiff has asserted that state defendants directed or supervised or caused this improper action of city defendants, the court has found against plaintiff's claim. 42 U.S.C. § 2000e-5(k) grants a court discretion in awarding attorney's fees to a prevailing party. Such discretion may be exercised in determining which defendant, among several, should be held liable for attorney's fees. *See Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040, 1044-45 (4th Cir. 1976); *Wisconsin Socialist Workers 1976 Campaign Committee* v. *McCann*, 460 F. Supp. 1054, 1058 (E.D. Wis. 1978). In light of the limited extent to which the state defendants' conduct contributed to the circumstances leading to this lawsuit, plaintiff's request that state defendants be held jointly and severally liable for an award of attorney's fees is denied.

II.

Should interest be awarded on back pay and, if so, in what amount?

Back pay is an indebtedness arising out of a violation of a statutorily-imposed obligation and is aimed at making the plaintiff whole. Interest to compensate for loss from delayed payment is likewise aimed at making the plaintiff whole. It is therefore appropriate that it be awarded in a case such as the present one. *Cf. McClanahan* v. *Mathews,* 440 F.2d 320, 325-326 (6th Cir. 1971) (interest on NLRB award of back pay).

With respect to the method of calculating interest, plaintiff proposes computation on an annual rather than quarterly basis (the quarterly basis being more favorable to plaintiff), the evidence introduced in this case not having disclosed earnings on a quarterly basis. The court concludes that computation on an annual basis is appropriate in this case.

In the absence of an applicable rule of federal practice, United States district courts commonly apply the rate prescribed by state law for the most nearly analogous circumstances. In this instance, the rate established by state law for contract actions generally, including actions on employment contracts, is the most nearly analogous rule. Mass. Gen. Laws c. 231, § 6C, as amended in 1974, provides that the interest rate be 8 per cent per annum.

Plaintiff contends that the rate should be increased to 10 per cent per annum effective September 19, 1980, because of the amendment of c. 231 § 6C effective that date. However, the amending act, Mass. Reg. Session 1980, c. 322, § 3, explicitly declares that the amendment "shall apply to causes of action commenced on and after the effective date of this act." The court therefore concludes that the rate to be applied is 8 per cent per annum.

Plaintiff contends that the interest should be compounded quarterly. Section 6C, however, provides for simple rather than compounded interest, and this court will follow the statutory rule of simple interest at 8 per cent per annum.

This rate is to be applied to the annual net difference between what plaintiff would have received as pay (excluding overtime) had she been appointed from the All-Women List and what she did earn. In view of the previous submissions of the parties, it appears likely that the determination of the annual figures can now be made by counsel in accordance with this ruling, without further dispute. Counsel are directed to confer for this purpose and advise the court promptly.

With respect to sick leave, the city defendants have proposed, as a compromise and without prejudice to their position, that a credit of fifteen days of accumulated sick days be included as an element of the equitable relief awarded. Absent a showing of good cause by plaintiff for a different disposition of this matter, the relief awarded will include a credit of fifteen sick days.

IV.

With respect to interim appointment, city defendants have agreed, subject to reservation of their appellate rights on other issues, that an appeal and its outcome would not affect plaintiff's appointment, though it might affect retroactive back pay, seniority, interest, and retirement benefits. If such an interim appointment is opposed, either by plaintiff or by state defendants, opposition, stating grounds therefor, shall be filed in writing, within seven days. If no opposition has been filed within the time permitted, the court proposes to order the interim appointment promptly and submits to the parties for their consideration the following proposed terms of the order:

Order for Interim Appointment

A. David Marchand, Personnel Administrator of the Divi-

sion of Personnel Administration, as successor to defendant Anne Ramsey, shall revive the all-woman list of police officers certified in 1974 to the City of New Bedford, said list consisting of the name of Lynda LeBoeuf Costa, subject to her passing a physical examination administered by the Division of Personnel Administration.

B. The current members of the Massachusetts Civil Service Commission, as successors to those named in *LeBoeuf* v. *Markey, et al.*, shall approve the revival of the list pursuant to St. 1976, c. 534.

C. Upon approval, the Personnel Administrator shall certify the name of Lynda LeBoeuf Costa to the City of New Bedford for appointment as a police officer.

D. The City of New Bedford and its officials and agents shall promptly appoint Lynda LeBoeuf Costa as a police officer of the New Bedford Police Department.

E. Plaintiff shall be placed in the status for current and future pay that she would have occupied had she been appointed on September 22, 1974 (with Jeanne Lawrence and Shirley Arsenault).

F. Except as hereinafter stated, plaintiff shall be given full seniority privileges as if she had been appointed on September 22, 1974 immediately prior to Jeanne Lawrence and Shirley Arsenault. These privileges include, but without limitation, election of vacations, number of vacation weeks, transfer rights and bidding rights. However:

1. Plaintiff shall not accrue retroactive seniority for purposes of eligibility for promotional exams (Mass. Gen. Laws c. 31, § 59).

2. Until the plaintiff has completed three (3) months' recruit training pursuant to applicable state law, plaintiff will be required to be assigned to limited (inside) duty.

3. Following completion of said recruit training, plain-

tiff will comply with the Union contract provision which now requires all new recruits to be first assigned to the Uniform Patrol Division Nights for three (3) years subject, however, to all bidding rights which she will have based on seniority as stated above or any contract amendments.

4. Upon appointment, plaintiff shall be required to satisfactorily complete training at a police academy (Mass. Gen. Laws c. 41, § 96B) and serve a probationary period (Mass. Gen. Laws c. 31, § 61) before her appointment becomes permanent.

5. Plaintiff will be credited with 15 days sick pay.

G. The Court shall retain jurisdiction of this matter during plaintiff's probationary period.

V.

A conference is scheduled for December 11, 1980 at 2:30 p.m., to determine whether plaintiff and city defendants can stipulate upon the amount to be awarded as attorneys fees, city defendants reserving their rights to challenge on appeal the determination that attorneys fees be awarded, as distinguished from challenging the amount. If no stipulation is reached as to the amount, or as to a procedure for determining the amount without full hearing by the court, counsel should be prepared to proceed with the hearing. Attention is directed to the attached memorandum regarding procedures for determining awards of attorneys fees.

Robert E. Keeton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LYNDA LeBOEUF COSTA, PLAINTIFF	:	
	:	C. A.
v.	:	No. 75-2915-K
ANNE RAMSEY, et al., DEFENDANTS	:	

September 16, 1980

Memorandum and Order

I. Introduction

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 and the Fourteenth Amendment, alleging discrimination in employment on the basis of sex. Plaintiff alleges, first, that defendants rejected her for a position on the New Bedford Police Department because of the application of a minimum height requirement and, second, that the imposition of the height requirement had a discriminatory impact on women.

The case came on for trial before the court on May 20 and 21, 1980. Arguments were heard on May 27, 1980, and the parties were allowed time to file additional memoranda. After consideration of the evidence adduced and the arguments made at trial and the proposed findings and conclusions,[1] memoranda, and other documents submitted by the

[1] Before and at the time of trial the parties filed proposed findings of fact and conclusions of law upon which the opposing parties had indicated, by underlining, those proposed findings that were contested. Accordingly, all non-underlined proposed findings of fact contained in State Defendants' Proposed Findings and Conclusions (which city defendants indicated was a joint submission) and

parties, the court has reached the findings and conclusions stated here.

II. Jurisdiction

This court has subject matter jurisdiction over this case under 28 U.S.C. §§ 1331, 1343(3) and (4), and 42 U.S.C. § 2000e-5(f).

III. Findings of Fact

A.

Plaintiff Lynda L. LeBoeuf, now known as Lynda L. Costa, is a thirty-two year old woman who is five feet three inches tall.

Defendant John A. Markey is the Mayor of the City of New Bedford and has been since 1971. In that capacity he has the appointing authority for the Police Department.

Defendant Joseph A. Pelletier is the Chief of Police of the City of New Bedford and has been since May, 1970. In that capacity he is responsible for the supervision, control, and management of the New Bedford Police Department.

Defendants Rosalind Pool Brooker, Brian Lawler, Donald R. Poory, George Rogers, William Saltzman, Paul G. Hamel, Richard Bachand, Donald R. Nelson, Richard Hinkle, Manuel F. Neto, and Ralph J. Saulnier comprised the New Bedford City Council on or about July 1, 1975. In that capacity they reviewed all bills and requirements submitted by the Mayor. They also had power to confirm appointments of police officers submitted by the Mayor.[2]

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all proposed findings of fact contained in Plaintiff's Proposed Findings and Conclusions that were not underlined by either state defendants or city defendants may be taken as established.

[2] Defendants referred to in this paragraph, together with defendants Markey and Pelletier, are hereinafter referred to collectively as the "city defendants."

Defendants Nancy Beecher, Wayne A. Budd, Richard J. Healey, Richard Linden, and John Donegan comprised the Massachusetts Civil Service Commission on or about July 1, 1975. Since that time Amelia Miclette has replaced Nancy Beecher as Chairperson of the Commission.

The Director of Civil Service for the Commonwealth of Massachusetts from at least July 1, 1973 through July 1, 1975, was Edward W. Powers. On July 1, 1975, the position of Director of Civil Services was abolished and the duties of the Director were allocated to the newly created position of Personnel Administrator. On July 1, 1975, defendant Anne Ramsey assumed the duties of Personnel Administrator. The position is now held by David Marchand.[3]

B.

Appointments to the New Bedford Police Department are subject to Massachusetts Civil Service laws, rules, regulations, and practices.

The New Bedford Police Department makes appointments from a list of eligible applicants that is certified to it by the state civil service personnel division. The certified lists at the center of this litigation were derived from a 1972 written examination for the position of police officer. Applicants' names appeared on this list in order of their scores on the test, adjusted for various statutory[4] and court-ordered[5] preferences.

On July 24, 1973, the New Bedford City Council approved Mayor Markey's establishment of a minimum height requirement for police officers of 5 feet 6 inches. At the time, a

[3] Defendants referred to in this paragraph and the preceding paragraph are hereinafter collectively referred to as the "state defendants."

[4] *See, e.g.*, Mass. Gen. Laws c. 31, § 26, regarding veterans' preferences under current law.

[5] *See Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972), *on remand*, 365 F. Supp. 655 (D. Mass. 1973).

Massachusetts statute authorized such action.[6] Appropriate state authorities were notified of the adoption of the height requirement. Prior Massachusetts law had also authorized imposition of a height requirement, and the City of New Bedford had first adopted a height requirement for police officers in 1972. New Bedford abolished the height requirement in November 1974.[7]

Before 1974, men and women police personnel in New Bedford held distinct positions with distinct duties, the men serving as "police officers" and the women as "policewomen." Different examinations were administered for the two positions. After February 1974 both men and women were eligible to be "police officers" and were appointed from so-called "integrated lists" derived from a common examination. Nevertheless, female police officers were not permitted to engage in street duty until January, 1977.

In the spring of 1973 New Bedford's certified list of eligible applicants for policewomen expired by operation of law. On or about that time New Bedford had an opening for at least one policewoman position and requested that the Division of Civil Service hold an open competitive examination for the position. No such examination was ever held. The city continued to seek a policewoman. It was advised that an exemption would have to be sought from the Massachusetts Commission Against Discrimination ("MCAD") since a gender-specific hiring was to be made. Such a request was submitted by letter of March 29, 1974.[8] MCAD replied by letter of May 9, 1974, authorizing New Bedford to use the certified list for policewomen already in existence for Taunton, Massachu-

[6] Mass. St. 1973, c. 351.

[7] Mass. St. 1974, c. 762, approved August 8, 1974 and effective November 8, 1974, abolished any height requirement for the position of police officer unless the appointing authority petitioned the appropriate state agency for such a requirement and included with the request a validation study.

[8] Plaintiff's Exhibit 1.

setts.[9] This list was never certified to New Bedford by the Division of Civil Service.

The Division of Civil Service supplied New Bedford with a certified list of eligible applicants for police officer on July 30, 1974. This was an "integrated list," containing names of eligible men and women ranked in accordance with scores on the 1972 examination, adjusted for various statutory and court-ordered preferences.[10] Plaintiff's name was not contained on this list.

On August 7, 1974, Edward M. Powers, then Director of the Division of Civil Service, notified Mayor Markey that plaintiff's name inadvertently had been omitted from the list. He instructed the Mayor to insert her name after that of William Grovell and before that of John Lopes. This position was consistent with the ranking that would have been afforded to an applicant who not only had scored 93.3% on the examination (as plaintiff had) and was a non-veteran resident of New Bedford (as plaintiff was) but also was a member of a racial minority to be accorded preference under *Castro, supra* (which plaintiff was not). Plaintiff's name should have been placed on the list in a position consistent with someone who had scored 93.3% on the 1972 written examination and was a non-minority, non-veteran resident of New Bedford.

On or about February 25, 1975, the Division of Civil Service took steps to correct the erroneous ranking of plaintiff on the list and by letter instructed New Bedford to place her name below that of Robert L. Linquest and above that of James F. Camacho, Jr., both of whom had filed applications for the police officer examination that indicated that they were non-minority, non-veteran residents of New Bedford. Neither Camacho nor Linquest has been appointed a police officer in New Bedford as a result of the July 30, 1974 certification.

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[9] Defendants' Exhibit 9.

[10] See text at nn.4 and 5, *supra*.

Both Grovell and Lopes, between whose names plaintiff's was originally placed, were appointed from the July 30 list.

As a result of the error in the initial placement of her name, plaintiff was interviewed in August, 1974 for the position of police officer in New Bedford. She was rejected because she failed to meet the 5 feet 6 inches height requirement. If plaintiff's name had been placed on the list in the proper position, her name would not have been reached and she would not have been interviewed for the position of police officer in August, 1974. This list has now expired. The name of the last person to be appointed from the list appears on the list above the plaintiff's name. No man whose name appears below plaintiff's on the list was appointed from the list. Several women whose names appear below the plaintiff's were appointed from lists derived from this list.[11]

The Division of Civil Service in compiling the list from the 1972 examination did not take account of an applicant's height. The height requirement was a local option permitted by statute, and some municipalities did not impose a height requirement. Accordingly, applicants who failed to satisfy a municipal height requirement were rejected at the time of the interview by the municipality.

Because of its continuing need for a female police officer to perform special duties, related, for example, to female prisoners, and because no woman's name appeared sufficiently high on the July 30, 1974 list to be reached in the normal course, New Bedford requested and received a special list, dated August 12, 1974, that was derived from the July 30, 1974 list but contained only the names of female applicants. Plaintiff's name appeared first on this list.

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[11] Jeanne F. Lawrence and Shirley R. Arsenault were appointed from a special list of female applicants when plaintiff and Carol A. Sacremento were rejected for failure to meet the height requirement. These appointments are described immediately *infra*. Ms. Sacremento was appointed as a result of a settlement reached in a dispute over the failure to appoint her from the all-women list.

Two appointments were made from the August 12 list.[12] The appointees ranked third and fourth on the list.[13] They both were at least 5 feet 6 inches tall. Plaintiff and the woman who ranked second were both less than 5 feet 6 inches tall and were rejected because they failed to satisfy the minimum height requirement.

Plaintiff offered at trial two sets of statistics to show the differential impact of a height requirement upon women as compared to men.[14] The first set was a table entitled "Height in inches, average height and selected percentiles, by age and sex: United States, 1960-62." This table was described at trial by plaintiff's counsel as being a National Health Service Survey compiled by HEW. It is described in plaintiff's proposed findings of fact as a compilation by the National Center for Health Statistics published in a booklet entitled "Weight, Heights, and Selected Body Dimensions of Adults," U.S. 1960-62.[15] The second set of statistics was a table entitled "Average Heights and Weights, By Age and Sex: 1960-1962 and 1971-1974." At trial plaintiff's counsel described this table as coming from the same source as the first table. Defendants indicated that they did not object to the introduction of these statistics on hearsay or authentication grounds but that they did object on the ground that the statistics did not have a sufficiently close nexus to this case. Defendants' objection was overruled.

The first set of statistics contains a wealth of data relative

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[12] See note 11, *supra*.

[13] At the time, former Mass. Gen. Laws c. 31, § 15B (now Mass. Gen. Laws c. 31, § 27) required that an appointment from a list of three or more eligible applicants willing to accept the position be made from one of the first three positions and that written explanation be given if the highest applicant on the list was not selected.

[14] Plaintiff's Exhibit 12.

[15] Plaintiff's Proposed Finding of Fact 26.

"(i heights of men and women in the period 1960-1962, among which are the following:

1. For men between the ages of 18 and 24 years:
   (a) average height: 68.7 inches, or 5 feet 8.7 inches.
   (b) 20th percentile[16] height: 66.5 inches, or 5 feet 6.5 inches.
2. For men between the ages of 25 and 34 years:
   (a) average height: 69.1 inches, or 5 feet 9.1 inches.
   (b) 20th percentile height: 66.8 inches, or 5 feet 6.8 inches.
3. For women between the ages of 18 and 24 years:
   (a) average height: 63.8 inches, or 5 feet 3.8 inches.
   (b) 80th percentile[17] height: 65.9 inches, or 5 feet 5.9 inches.
4. For women between the ages of 25 and 34 years:
   (a) average height: 63.7 inches, or 5 feet 3.7 inches.
   (b) 80th percentile height: 65.7 inches, or 5 feet 5.7 inches.

The second set of statistics repeats the average height data for the years 1960-1962 contained in the first set and also contains the following information regarding average heights for the period 1971-1974:

1. Ages 18-24 years:
   (a) men: 69.7 inches, or 5 feet 9.7 inches.
   (b) women: 64.3 inches, or 5 feet 4.3 inches.

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[16] "Percentile" is "a value on a scale of one hundred that indicates the percent of a distribution that is equal to or below it." Webster's New Collegiate Dictionary (1979). For example, that the 20th percentile height for men between 18 and 24 is 66.5 inches indicates that 20% of the men in that age group are 66.5 inches tall or less.

[17] In other words, 80% of the women in the age group were 65.9 inches tall or less.

2. Ages 25-34 years:
   (a) men: 69.6 inches, or 5 feet 9.6 inches.
   (b) women: 64.1 inches, or 5 feet 4.1 inches.

On or about September 9, 1974, plaintiff filed a charge of discrimination with MCAD, complaining of violations of the Civil Rights Act of 1964.

On or about September 16, 1974, plaintiff filed a charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), complaining of violations of the Civil Rights Act of 1964.

On December 20, 1974 MCAD issued a finding of probable cause of sex discrimination against the defendants. The probable cause finding states in its conclusion:

> Conclusion - the 5' 6" height requirement has a disparate impact on women and has not been shown to be job related; because she did not meet this requirement complainant was denied a position as police officer, and seven males that were below her on the certification list were appointed. The evidence therefore supports the finding of probable cause to believe that complainant was denied appointment because of her sex.

On April 1, 1975 MCAD notified New Bedford that part of its probable cause decision was based on a mistake but that nevertheless MCAD, after reviewing the evidence, reaffirmed the decision of probable cause for the following reason:

> But for the height requirement the complainant would have been appointed as a police officer pursuant to the selective certification process. As a woman she has standing to challenge this height requirement as being discriminatory towards women. The evidence set forth in the September [sic] twentieth finding provides probable cause to believe that the height requirement discriminates against women and was illegal under Chapter 151B.

These probable cause findings were not introduced at trial. It appears that the mistake referred to in the April 1 communication probably related to an initial, mistaken understanding by MCAD that the initial (erroneous) placement of plaintiff's name on the July 30, 1974 list was the correct placement of her name on that list.

EEOC has issued plaintiff a notice of right to sue.

III. *Claim under 42 U.S.C. § 1981*

Although plaintiff's complaint asserts a violation of 42 U.S.C. § 1981,[18] it is not at all clear that she intends to press this claim, since memoranda of law filed by her at and after trial do not advert to a violation of § 1981.[19] In any event, "[t]he overwhelming weight of authority holds § 1981 not applicable to discrimination based on sex." B. Schlei and P. Grossman, *Employment Discrimination Law* 610 (1976) (see 1979 Supplement at 139). Plaintiff is not entitled to recover under 42 U.S.C. § 1981.

IV. *Claim under 42 U.S.C. § 1983*

42 U.S.C. § 1983[20] creates a remedy but does not itself confer any substantive rights. *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 617-618 (1979) ("one can-

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[18] 42 U.S.C. § 1981 provides in relevant part as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

[19] See Plaintiff's Supplemental Memorandum of Law, filed May 20, 1980 at trial, and Plaintiff's Memorandum of Law on Damages, filed June 9, 1980 (Document 18).

[20] 42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

not go into court and claim a 'violation of § 1983' - for § 1983 by itself does not protect anyone against anything"; "[s]tanding alone, § 1983 clearly provides no protection for civil rights since . . . § 1983 does not provide any substantive rights at all"). Typically, § 1983 has been invoked to remedy alleged violations of the Fourteenth Amendment. Recently the Supreme Court has indicated that § 1983 encompasses not just claims of constitutional violations but also claims based solely on violations of federal statutory law. *Maine* v. *Thiboutot*, 48 U.S.L.W. 4859 (June 25, 1980).

The only federal statutory provision arguably violated in this case is Title VII.[21] The decision of the Supreme Court in *Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366 (1979), indicates by implication that a right created by Title VII cannot be the basis for a cause of action under § 1983. *Novotny* deals with an attempt to invoke 42 U.S.C. § 1985(c), like § 1983 a remedial provision creating no substantive rights, to redress an alleged violation of Title VII. Focusing on the fact that allowing a violation of Title VII to be asserted through the remedial framework of § 1985(c) would allow the claimant to bypass the critical administrative process and other detailed and specific provisions of Title VII, the Court held that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c). Plaintiff has no viable statutory § 1983 claim.

The heart of plaintiff's § 1983 claim is her assertion of a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. To make out this claim plaintiff must show that defendants acted with discriminatory purpose. *Washington* v. *Davis*, 426 U.S. 229 (1976).

[21] Plaintiff has not asserted the violation of any federal statute as the basis for her § 1983 claim. Nevertheless, it seems appropriate for the court to address this potential basis for relief. Plaintiff has asserted a violation of Title VII. If a violation is found and plaintiff could invoke § 1983 to remedy that violation, the scope of available remedies would be enhanced.

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effect upon an identifiable group.

Personnel Administrator v. *Feeney*, 442 U.S. 256, 279 (1979). A showing of a disproportionate impact is relevant to this determination since discriminatory purpose may be inferred from the totality of the relevant facts, but standing alone, without a finding of discriminatory purpose, disproportionate impact does not establish a violation of the equal protection clause. *Washington* v. *Davis, supra*, at 241, 242; *Personnel Administrator* v. *Feeney, supra*, at 274, 275, 279 nn.24, 25; *see Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-268 (1977).

In this case, based on the totality of the circumstances, the court concludes that defendants did not act with forbidden discriminatory purpose in imposing a height requirement on candidates for police officer. At the time the requirement was imposed a state statute authorized its imposition. Although the city defendants had not and have not undertaken any validation studies to establish the job-relatedness of the height requirement, the court concludes that at the time the requirement was imposed defendants believed that it was job-related and that the height requirement was not adopted "because of" its adverse effect upon women. During the period in question the city defendants were affirmatively seeking female police personnel. Although the city defendants after adopting a unitary selection procedure continued until 1977 to differentiate between male and female police officers in terms of assigned duties, plaintiff cannot establish a Fourteenth Amendment cause of action on this basis, since she was neither on the police force then nor able to establish a Fourteenth Amendment cause of action for denial of her application.

Because the court concludes that defendants did not act with forbidden discriminatory purpose in imposing the height requirement, plaintiff's Fourteenth Amendment equal protection claim fails.

V. *Claim Under Title VII*

A. Nature of the Cause of Action

Title VII is the source of a legal duty regulating the conduct of certain actors. It may be helpful to view it, like 42 U.S.C. § 1983, as creating a species of liability in the nature of tort, *cf. Imbler* v. *Pachtman*, 424 U.S. 409 (1976), although, of course, the remedies contemplated by Title VII differ from those traditionally available in tort. *See* 42 U.S.C. § 2000e-5(g).

In the traditional tort context, a plaintiff, in order to establish a cause of action, must prove not only a violation of a legal duty to the plaintiff but also that the violation has had an impact on some legally protected interest of the plaintiff. In the language of the shorthand formulation often used to describe the elements of a cause of action for common law negligence, a plaintiff must establish: (1) duty, (2) breach of duty, (3) cause, and (4) harm. *See* W. Prosser, Torts § 30 (4th ed. 1971); Restatement (Second) of Torts § 281 (1965). The existence of the first and second elements of this formulation make the defendant's conduct negligent, or, more generally put, wrongful. The existence of the third and fourth elements make the negligent (or wrongful) conduct of the defendant actionable by the plaintiff. *See* Restatement (Second) of Torts § 281, comment *a* (1965).

This same framework can profitably be applied to analyze plaintiff's Title VII claim. In particular, the issues raised by the distinctive circumstances of the two applications of the minimum height requirement against plaintiff - once to deny

her an appointment from the all-women list - are by nature closely analogous to those commonly, though not uniformly,[22] referred to in the basic law of torts as issues of legal cause.

B. Legal Duty and Violation

In the context of a Title VII claim, the statute itself is the source of the relevant legal duty. The nature and dimensions of that duty are fleshed out by precedents interpreting the statute. Decisions of the Supreme Court make clear that in a Title VII[23] disparate impact[24] case, to establish a prima facie

[22] Although the terminology of "proximate cause" or "legal cause" is more often used, these issues are sometimes referred to in terms of "duty." *See, e.g.*, W. Prosser, Torts § 43, at 250 (4th ed. 1971). Such use of the term "duty" is fundamentally different from the use of the term in this opinion, since it subsumes issues addressed here under the rubric of "legal cause."

[23] The relevant substantive provision of Title VII in this case is codified at 42 U.S.C. § 2000e-2, which provides in relevant part as follows:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

It may be noted that plaintiff has not named the City of New Bedford as a defendant in this action. She has, however, sued in their official capacities the persons with authority to make and approve appointments of members of the police force. These defendants in their official capacities may be taken to be "an employer" within the meaning of 42 U.S.C. § 2000e-2.

[24] There are two basic genres of Title VII employment discrimination cases: disparate treatment cases and disparate impact cases. *See, e.g., Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 581-582 (1978) (Marshall, J., dissenting).

case of violation of the statute,

> a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.* [401 U.S. 424], at 432. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co.* v. *Moody*, [422 U.S. 405], at 125, quoting *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801.

Dothard v. *Rawlinson*, 433 U.S. 321, 329 (1977).

Statistics offered by plaintiff establish the significantly disparate impact of a 5 feet 6 inches minimum height requirement upon women as compared to men. Generalized national statistics, such as those offered by plaintiff here, will suffice to make out a prima facie case of violation of Title VII; plaintiff was not required to adduce comparative statistics concerning actual applicants for police officer positions. *Id.*, at 330. Plaintiff's statistics make out a prima facie case of violation of Title VII through unlawful discrimination on the basis of sex.

Defendants do not deny that as a general proposition application of a 5 feet 6 inches minimum height requirement to a group of men and women will have a disparate impact on the women. They also do not deny that plaintiff was rejected for appointment because of the application of the height requirement to her. Rather, they argue that plaintiff suffered no discrimination as a result of the imposition of the height

requirement. Their theory is twofold. With respect to the refusal to appoint plaintiff from the integrated list when her name was called, defendants assert that because plaintiff's name was located erroneously on the list and would not have been reached had it been properly located, there was no discrimination as to which plaintiff is entitled to complain.[25] With respect to the refusal to appoint plaintiff from the all-women list, defendants assert that as a matter of law there can be no discrimination on the basis of sex involved in the choice of one woman over another from a pool comprised only of female applicants.

Although deserving consideration in relation to issues in this case of legal cause and of existence of remediable harm, these arguments are not persuasive in relation to the question of the existence of a violation of Title VII. Plaintiff's prima facie case of violation of the statute relative to the general discriminatory impact of the height requirement upon women remains unrebutted. City defendants did act in violation of Title VII when they applied a minimum height requirement, which requirement had a negative disparate impact on female applicants for employment in the city's police force. There remain, however, issues of legal cause and of existence of remediable harm to plaintiff.

C. Legal Cause and Remediable Harm

As previously indicated (see Subpart A, *supra*), in order to establish a cause of action, plaintiff must prove not only a violation of a legal duty to her but also that the violation has had an impact upon some legally protected interest of hers. The second part of this formulation - that the violation has

[25] Defendants couch this argument in terms of plaintiff's lack of standing, because of no injury in fact, but their argument can also be read as an assertion that plaintiff has failed to state a claim upon which relief can be granted.

had an impact upon some legally protected interest of plaintiff's - involves related issues of legal cause and existence of remediable harm.

(1) The Standard for Determining Legal Cause

Proof of legal cause is essential to the existence of a cause of action entitling plaintiff to any relief whatsoever. *See Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977). Legal cause subsumes two elements: (1) causation in fact, traditionally expressed either as a requirement that the conduct in question be a "substantial factor" in bringing about the harm or as a requirement that the harm would not have occurred "but for" the conduct in question; *compare* Restatement (Second) of Torts § 431 (1965) *with* E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 80.18 (1977); and (2) rules limiting the scope of liability because of the manner in which the conduct has resulted in the harm.[26] *See* Restatement (Second) of Torts § 431 (1965); W. Prosser, Torts § 42 (4th ed. 1971).

In the context of the basic law of torts, two contrasting points of view have influenced the development of the doctrine of legal cause in relation to the second of these elements. One of those points of view, supported by reasoning that the scope of liability should be commensurate with the basis of liability, favors an explicit rule limiting the scope of liability for negligence to persons within the risks by reason of which defendant's conduct is determined to be negligent,[27] and if rigorously extended, favors limiting the

[26] For example, a rule requiring that the harm was a natural and probable consequence of the conduct. *See* E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 80.18 (1977).

[27] This point of view, applied to the persons-within-the-risk issue, is expressed in the majority opinion in *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928) (Cardozo, J.). The policy

scope of liability to results within the scope of those risks.[28] The other point of view, focusing somewhat more upon the way the injury is "connected with the negligence" and taking into account "many considerations" of policy and practical judgment, aims to determine whether the connection is such that the injury may be said to have been proximately caused by the negligence.[29] Among these "many considerations," however, "foreseeability of the harm" (a concept very close to "result within the scope" of relevant risks) has been most prominent.[30] Thus, under each of these mainstreams of thought about legal cause, concern about whether the harm at issue is of the general type the legal rule was designed to redress is a major influence on the decision that plaintiff's harm was or was not legally caused by defendant's wrongful conduct. Moreover, this general principle of limiting the scope of liability by a standard related to the reasons for characterizing conduct as wrongful appears not only in basic

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foundation of this rule is stated crisply in *Sinram* v. *Pennsylvania R.R.*, 61 F.2d 767, 770 (2d Cir. 1932) (Learned Hand, J.):

> But so long as it is an element of imposed liability that the wrongdoer shall in some degree disregard the sufferer's interests, it can only be an anomaly, and indeed vindictive, to make him responsible to those whose interests he has not disregarded.

[28] *See, e.g.*, Seavey, Mr. Justice Cardozo and the Law of Torts, 39 Colum. L. Rev. 20, 29-39; 52 Harv. L. Rev. 372, 381-91; 48 Yale L.J. 390, 399-409 (1939).

[29] *See, e.g., Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928) (dissenting opinion of Andrews, J.); W. Prosser, Torts § 43 (4th ed. 1971).

[30] "Except only the defendant's intention to produce a given result, no other consideration so affects our feeling that it is or is not just to hold him for the result of foreseeability; and no other consideration so largely influences the courts." Edgerton, Legal Cause (pt. 2), 72 U. Pa. L. Rev. 343, 352 (1924). *Cf.* W. Prosser, Torts § 43, at 258 (4th ed. 1971).

tort doctrine but as well in other more specialized bodies of law.[31] It is a principle of pervasive influence.

Precedents relating to the scope of liability for violations of Title VII are consistent with this general principle of legal cause. Liability extends to harm that (1) was caused in fact by defendant's violation of Title VII - *see* 42 U.S.C. § 2000e-5(g), and *cf. Mt. Healthy City School District Board of Education* v. *Doyle, supra* (applying traditional "but for" test to a claim based on 42 U.S.C. § 1983) - and (2) was within the scope of the types of harm against which Title VII is directed. The latter limitation, as will be developed in subsection (2) below, has been derived from the manifest objectives of the statute and the mandates its expresses.

Before the objectives and mandates of the statute are examined, it may be useful to observe one additional point. Applying the legal cause standard to a particular case is a function ordinarily performed by the factfinder - jury or, in a non-jury case, trial judge. Only if reasonable persons, correctly understanding the legal standard, could not differ about the outcome of its application to the evidence presented in the particular case is the legal cause issue determined by the court as questions of law are determined. If reasonable persons might differ, the legal cause issue is determined by the factfinder. This determination is by nature, however, not a finding of pure fact but instead a common-sense evaluation of the evidence as measured by the applicable legal standard.

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[31] *E.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (injury must be "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful"); *A.D.M. Corp.* v. *Sigma Instruments, Inc.*, No. 80-1088 (1st Cir., Sept. 5, 1980) (sustaining district court finding that alleged injury was not "antitrust injury" in the absence of a showing that injuries, flowing from alleged business torts, had an unreasonable effect on competition) (citing III P. Areeda & D. Turner, Antitrust Law ¶ 737 (1978); *see also* II *id.* 333 *et seq.*).

Cf. W. Prosser, Torts § 45 (4th ed. 1971). Moreover, in whatever way one may express the standard, its application to any set of facts that produces disagreement among reasonable persons inherently involves an element of fiat that can be defended as reasonable but cannot be demonstrated by reason to have been the only possible outcome of faithful application of an authoritative rule of law to a given set of facts. Compare the opinions of Learned Hand, J., in *Sinram*, n.27, and Andrews, J., dissenting in *Palsgraf*, n.29, *supra*.

(2) The Scope of Legal Cause and the Scope of Available Relief in Title VII Cases

Issues concerning the existence of remediable harm are intimately related to issues of legal cause. Remediable harm in turn subsumes two subsidiary issues: (1) the existence of harm to the plaintiff; and (2) the availability of a legal remedy for that harm.[32]

In a Title VII action, by statutory directive, certain traditional legal remedies - for example, compensatory damages - are not available.[33] B. Schlei and P. Grossman, Employment

[32] In the present case plaintiff seeks declaratory relief establishing that her rights protected by Title VII have been violated. In addition, she seeks injunctive relief that would (1) restrain defendants "from taking any action which further interferes with plaintiff's right to equal employment" (Plaintiff's Complaint, p. 16); (2) require her appointment as a police officer in the City of New Bedford; (3) require the city defendants to institute "a recruitment system in which affirmative action is taken to provide an adequate rememdy for the defendants' past and present discriminatory practices (*id.*, p. 17)"; and (4) order back pay and retroactive seniority and benefits for plaintiff. Plaintiff also seeks costs and attorneys' fees.

[33] The point of departure for determining the legal remedy to which plaintiff is entitled is 42 U.S.C. § 2000e-5(g), which provides as follows:

Discrimination Law at 1258 (1976) (see 1979 Supplement at 338). This is at once a statement about the types of harm to which Title VII is directed and a statement about the scope of available relief, but the two are not necessarily identical. Thus, although the scope of relief does not extend to damages for the mental and emotional impact upon a plaintiff of a violation of Title VII, this does not necessarily mean that mental and emotional impact are beyond the types of harm to which Title VII is directed. It may instead mean only that if a remedy is allowed, it must be some remedy other than an award of monetary damages. This distinction between the scope of

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If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employer agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Courts addressing the issue appear to have interpreted the use of the word "intentionally" in the statute to refer not to motivation but to knowledge of consequences. *See* B. Schlei and P. Grossman, *Employment Discrimination Law*, 1197 at n.2 (1976). This interpretation is in harmony with the Supreme Court's statement in

harm to which Title VII is directed and the relief available is well illustrated by the fact that harm in the nature of lost wages may be redressed in a Title VII action through an equitable award of backpay even though that same harm is not compensable through the legal remedy of monetary damages. This aspect of the standards relating to legal cause and remediable harm will be considered further in subdivision (3) below.

(3) Application of the Legal Standards To The Present Case

In the circumstances of this case, has plaintiff established that City defendants' violation of Title VII was a legal cause of remediable harm to her? If so, to what relief, if any, is she entitled?

On two occasions the minimum height requirement, the imposition of which violated Title VII for reasons stated in Part V-B, *supra*, was supplied to deny plaintiff an appointment she would have received but for application of this requirement. Thus, a but-for causal relationship between use of the minimum height requirement and nonappointment of plaintiff is established. In both instances, however, issues of legal cause and remediable harm are presented.

(a) Denial of Appointment from the Integrated List

When the city defendants applied the minimum height re-

Griggs v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), that Title VII is directed "to the *consequences* of employment practices, not simply the motivation." (Emphasis in original.) *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). In the present case, city defendants acted with knowledge of the consequences of disparate impact of the height requirement on women and therefore "intentionally engaged in . . . an unlawful employment practice" as that phrase is used in 42 U.S.C. § 2000e-5(g) even though, as stated in Part IV, *supra*, they did not act with "discriminatory purpose" in the sense relevant to plaintiff's § 1983 claim.

quirement to deny plaintiff an appointment from the integrated list, in competition with men as well as other women, the appointment that plaintiff would have received but for the minimum height requirement would have been an invalid appointment, since it would have been based on the erroneously high position of her name on the list due to the inadvertent error of placing her where she should have been if she had been a minority applicant. It is probable that the invalidity would have been discovered shortly after the appointment. It is also probable that the invalid appointment would have been rescinded promptly after discovery of its invalidity, though it is less clear that in the world of practical affairs plaintiff then would have had no better prospect of remaining on or being appointed to the city police force than if she had never received the invalid appointment. Thus, in this instance the application of the minimum height requirement was a but-for cause of plaintiff's being denied an *invalid* appointment, the invalidity of which probably would have become known shortly after her appointment and the practical value of which, speculative at best, would not have included a confirmed status on the city police force.

In the essentially evaluative application of the legal standards to the evidence concerning the failure to appoint plaintiff from the integrated list, the court finds that loss of the wages and benefits she would have received had she been *invalidly* appointed from the integrated list are not results within the scope of Title VII protection.

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, 421 (1975), makes clear that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past

discrimination."[34] "The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate." *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 719 (1978).

Viewing the issue related to loss of wages and benefits resulting from the failure to receive an invalid appointment from the perspective of the *Albemarle* presumptive rule in favor of retroactive relief, the court concludes that this is not an instance in which it would be appropriate to award backpay or other retroactive relief. This claim for backpay and other retroactive relief is a claim for imposition of liability for a harm beyond the scope of the type of results against which Title VII is directed. At the time of the decision now under discussion, plaintiff would not have received a *valid* appointment even if the defendants had not discriminated against women. Thus, plaintiff suffered no loss of pay that would justify an award of backpay or other retroactive relief. Also, such relief has not been shown to be necessary in this instance to coerce compliance in the future, since the city long ago ceased to impose the height requirement. Nor can it be said that denial of such relief would "frustrate the central statutory [purpose] of eradicating discrimination throughout the economy," *Albemarle* v. *Moody Paper Co.*, *supra*, at 421, by creating an incentive structure for the elimination of practices of dubious legality," *id.*, given the existence of a state statute authorizing imposition of a height requirement at the time the height requirement was applied in this instance to plaintiff, and the then-existing stage of evolutionary development in the interpretation of Title VII.

[34] Backpay serves the first of these purposes by creating an incentive to elimination of "practices of dubious legality" beyond that present merely in the prospect of injunctive relief. *Albemarle Paper Co.* v. *Moody*, *supra*, at 417. The connection of backpay with the "make whole" purpose is obvious. The same purposes served by backpay awards are served by other forms of retroactive relief.

These conclusions about backpay, retroactive relief, and relief aimed at coercing future compliance, however, fall short of demonstrating that plaintiff has sustained no harm at all within the types of results against which Title VII is aimed. The absence of proof that defendants' wrongful conduct caused economic harm, when she was not appointed from the integrated list because of application of the minimum height requirement, is not fatal to plaintiff's claim of actionable violation of a legally protected right. *Cf. Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978) (denial of procedural due process actionable under 42 U.S.C. § 1983 for nominal damages without proof of actual injury).[35] As already noted, in Part V-B, *supra*, plaintiff was a member of a group as to which the minimum height requirement had a significant negative disparate impact. She was rejected for a position on the police force because of application of this minimum height requirement. Without doubt she suffered mentally and emotionally, if not economically, from the application of that requirement through a period of time while the requirement was in use. Even though Title VII does not create a cause of action for damages for mental and emotional impact, and even though no other statutory or decisional basis for such an award can be identified (see Parts III and IV, *supra*), the existence of such harm bears upon the question whether she has met the legal cause and remediable harm elements of a cause of action for declaratory relief within the scope of the Declaratory Judgment Act, 28 U.S.C. § 2201, and Title VII. Even though city defendants abandoned the minimum height requirement in 1974, they have persisted, even to the present moment, in contending that no violation of plaintiff's rights under Title VII ever occured. In this context, the court concludes that

[35] There are, of course, instances entirely apart from Title VII and § 1983, in which proof of economic harm is not essential to existence of a legal remedy. *E.g., Morningstar* v. *Lafayette Hotel Co.*, 211 N.Y. 465, 105 N.E. 656 (1914) (Cardozo, J.).

mental and emotional impact constitutes harm sufficient to establish a right to a declaratory judgment that serves, consistently with the central objective of Title VII, the function of vindication. *Cf. Carey* v. *Piphus, supra,* at 266-267 (denial of procedural due process actionable under 42 U.S.C § 1983 for nominal damages without proof of actual injury). Plaintiff has established that the violation of Title VII by city defendants in this instance did produce a legally cognizable impact upon her for which she is at least entitled to declaratory relief setting that controversy at rest.

(b) Denial of Appointment from the All-Women List

In the second instance of application of the minimum height requirement to deny plaintiff an appointment, the appointment was made from an all-women list. This application of the minimum height requirement was a but-for cause of denial of plaintiff's appointment, but only in the context of a competition among women for an appointment. It might be argued, then, that plaintiff did not suffer harm from discrimination against women. However, the only reason that application of a height requirement produces a disparate impact upon women as a class is that it produces such impact upon the subclass of women who do not meet the height requirement. Thus, the action of city defendants in this case when they applied the height requirement to the selection from the all-women list was essential to maintaining the credibility of the height requirement in a broader context. To have abandoned application of the requirement in the all-women context would have been so inconsistent with their implicit position that the height requirement was job-related that it would have undercut fatally their position with respect to application of the height requirement to the integrated list.

For this reason, even though the discrimination based on the height requirement in the particular instance of its application to the all-women list was among women only, it was so intimately and integrally related to the broader use of the height requirement that the contention that it was not a cause of legally cognizable harm to plaintiff cannot be sustained. The compelling public interest manifested in the objectives of Title VII are best served by recognizing a cause of action for harm so integrally related to the defendants' use of a criterion of employment forbidden by Title VII. Accordingly, the court finds that in this instance the legal cause and remediable harm elements are satisfied not only for the reasons applying to denial of an invalid appointment from the integrated list - because of the mental and emotional harm suffered by plaintiff and because of her interest in vindication through declaratory relief - but also because but for application of the height requirement to the selection from the all-women list, plaintiff would have been on the police force under a valid appointment. The relief appropriate in this instance, therefore, may extend not only to declaratory relief but also to backpay to redress whatever pay advantage that appointment would have yielded to plaintiff. On the basis of the evidence in this case the court concludes that plaintiff has met her burden of proof to the extent of showing that it is more probable than not that she would have continued on the police force and would have received advances in pay and status no later than the time such advances were received by Jeanne Lawrence and Shirley Arsenault, who were appointed from the all-women list when plaintiff was rejected.

Weighing equities, the court denies plaintiff's claim for overtime. One factor the court has considered is the absence of bad faith on the part of the defendants. A second factor is that, though the opportunity to serve overtime is a significant incident of an appointment, any equitable claim to overtime

pay is undercut by the fact that it would be pay for time not served, and in these circumstances the "net" loss after taking account of alternative use of this time, in mitigation, is speculative. A third factor is the distinctive nature of the casual relation between the defendants' conduct and the plaintiff's harm in this case.

In structuring appropriate relief this court must take into account not only the interests of the parties but also the public interest. This constellation of interests will be best served in this instance by a decree that includes the following provisions: (1) The all-women list of 1974 will be reconstituted for one appointment to the New Bedford police force; if plaintiff satisfies other legitimate appointment criteria, including a physical examination, then as the highest ranking person on the reconstituted list she will be appointed and will be placed in the status for backpay, and the status for current and future pay, that she would have occupied had she been appointed at the same time as Jeanne Lawrence and Shirley Arsenault. (2) For purposes other than pay status plaintiff's lack of experience she would have had if she had served on the police force throughout the period since she was improperly denied appointment may be taken into account, in recognition of the public interest - for example, the public interest in assignments appropriate to her experience.

The parties will be directed to confer with respect to the drafting of the terms of an order consistent with these rulings and to submit an agreed proposal, or their respective proposals if they cannot reach agreement. The order will include a determination of the backpay award due under these rulings as well as directives regarding other conditions of the appointment, work assignments and future pay.

(4) The Arguments of Mootness and Lack of Standing

Defendants have argued that controversy over the 1974

violations is now moot and that plaintiff lacks standing to complain. Each of these contentions fails.

Plaintiff proved the essential elements of a cause of action in her favor. In particular, she proved that city defendants applied an unlawful minimum-height requirement to deny her an appointment and that their action was a legal cause of remediable harm to her. Once this cause of action came into being, as it did in August, 1974, it could not be destroyed by the city's abandonment of the height requirement as to the future. That later action may render moot a claim for particular forms of relief that might otherwise have been available, such as an injunction against future use of the height requirement. *Cf. County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979). It did not render moot her claims for declaratory and injunctive relief with respect to the violations that had previously occurred. The cause of action for that relief had already ripened. Defendants have nevertheless persisted in contending that no violation of plaintiff's rights ever occurred. In these circumstances, even if the court had resolved the legal cause and remediable harm issues in the context of the failure to appoint plaintiff from the all-women list by concluding that plaintiff was entitled only to declaratory relief, defendants would not be in any position to assert that declaratory relief would be insubstantial or vacuous, even apart from its potential relevance to other relief such as an award of attorneys' fees (see Part V-C, *infra*). Nor can defendants' standing argument be sustained. To pursue defendants' standing argument to its logical conclusion would be to hold that the imposition of the height requirement could not be challenged in court until some woman less than 5 feet 6 inches tall scored sufficiently high on a civil service exam to be passed over on a certified list when her name was reached because of application of the height requirement. Surely this cannot be so when the mere existence of the height requirement might be ex-

pected to discourage otherwise qualified women from taking the civil service exam because of a self-recognized inability to meet the height requirement. *Cf. Dothard* v. *Rawlinson, supra*, at 330. As a female applicant for the position of police officer, plaintiff was a member of a group as to whom the height requirement had a sufficient negative disparate impact. The injury-in-fact component of the standing requirement[36] is satisfied by her status as a member of this group, even if problems of causation pose obstacles to granting all the relief she seeks.

(5) Plaintiff's Request for Injunctive Relief

Plaintiff's request for generalized injunctive relief restraining defendants "from taking any action which further interferes with plaintiff's right to equal employment" is not framed with sufficient particularity to avoid future disputes over its interpretation and is for that reason denied.

Plaintiff has not shown why it would be appropriate in the context of this action by an individual plaintiff to order what would appear to be classwide relief, the institution by the city defendants of an affirmative action program. Nor has plaintiff suggested how such a program, if ordered, should be structured. This request is denied.

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[36] As typically formulated, the doctrine of standing has two components: (1) injury in fact and (2) zone of interests. *E.g., Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970). "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.*, at 152. The second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*, at 153. There can be no question here that plaintiff satisfies the zone-of-interest component. Defendants do not argue otherwise.

C. Attorney's Fees

Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), authorizes the court in a Title VII action to allow the prevailing party a reasonable attorney's fee as part of costs. "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). The degree of a plaintiff's success will affect the amount of attorney's fees awarded, not their availability. *Id.*

A prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances." *New York Gaslight Club, Inc.* v. *Carey*, 48 U.S.L.W. 4645, 4647 (June 9, 1980), quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978). *See Albemarle Paper Co.* v. *Moody*, *supra*, at 415. *See also Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). No "special circumstances" have been shown here that would justify a departure from the ordinary rule of allowing an award of attorney's fees to plaintiff.

ORDER

A hearing is scheduled for November 7, 1980, at 3:30 p.m., to address the following issue, in light of the findings and conclusions stated in this memorandum:

1. *Terms of Relief*
   (a) To what amount is plaintiff entitled as back pay?
   (b) What should be the precise nature and scope of other relief, including any directives regarding conditions of plaintiff's appointment and her status in the future in relation to pay and in relation to work assignments and other conditions of employ-

ment? Should the court, rather than attempting to fashion a detailed order regarding events that may occur during the customary probationary period for an appointee to the police force of New Bedford, retain jurisdiction during that period to resolve any controversy that may arise?

(c) To what extent, if any, should part or all of the relief run against one or more of the state defendants as well as the city defendants?

2. *Attorney's Fees*

(a) What would be a reasonable amount to award to plaintiff as attorney's fees?[37] Plaintiff should be prepared to offer evidence in support of any fees claimed, and defendants may offer evidence if they wish to do so. Such evidence may be offered by affidavit unless an oral evidentiary hearing is requested by one of the parties.

(b) Should all state defendants and all city defendants be required to contribute to the award of attorney's fees to plaintiff? If not, what is the basis for distinguishing among them, and what authorities support such distinction?

Robert E. Keeton,
United States District Judge

[37] The attention of the parties is directed to *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978), and its progeny and to *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), relative to the factors to be considered by a district court in arriving at the amount to be awarded.

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No. 83-295

In the Supreme Court of the United States

OCTOBER TERM, 1983

LYNDA LEBOEUF COSTA,
PETITIONER,

v.

JOHN A. MARKEY, ET ALS.,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I

QUESTION PRESENTED FOR REVIEW

Whether, pursuant to a Title VII action under disparate impact analysis, a female plaintiff who has been denied appointment by an employment requirement that classifies far more women than men as ineligible for an employment position which is open to both men and women is prevented from establishing a *prima facie* case of discrimination because in a particular round of the hiring process the applicant pool contained only women.

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LYNDA LEBOEUF COSTA,
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RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

John A. Markey, *et als.*, various officials of the City of New Bedford, file this Brief in Opposition to the Petition for a Writ of Certiorari of Lynda LeBoeuf Costa.

Opinions Below

The opinion of the District Court is reported: *LeBoeuf* v. *Ramsey*, 503 F. Supp. 747 (D. Mass. 1980) and is attached to the petition at p. 47a.

[1] This Brief is presented on behalf of those original defendants who are officials of the City of New Bedford, or their successors. The parties as originally named in the complaint have been accurately restated in the petition, although the last sentence of the "List of Parties" incorrectly asserts that the City of New Bedford is somehow represented there.

A Second group of Defendants, who are Massachusetts State officials, have elected to forego any submissions to this Court.

The opinion of the original appellate panel of the Court of Appeals is reported: *Costa* v. *Markey*, 677 F.2d 158 (1st Cir. 1982) and is attached to the petition at p. 28a. The citation given by the Petitioner is incorrect.

The opinion of the rehearing panel of the Court of Appeals is reported: *Costa* v. *Markey*, 706 F.2d 1 (1st Cir. 1983) and is attached to the petition at p. 11a. The citation given by the Petitioner is incorrect, having been withdrawn by the publisher.

The opinion of the Court of Appeals *en banc* is reported: *Costa* v. *Markey*, 706 F.2d 1, 10 (1st Cir. 1983), and is attached to the petition at p. 2a.

Jurisdiction

The latest judgment of the Court of Appeals was entered on May 23, 1983. Jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1).

Statute Involved

The statute involved is §703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1976). The relevant portion has been reprinted in the petition.

Statement of the Case

In the spring of 1973, the Police Department of the City of New Bedford, Massachusetts (hereinafter "City"), began to experience a need for additional female police employees. Until this time, men and women held distinct positions within the police department. Women, who were known then as "policewomen," were not allowed to perform the general street duties that the male "police officers" were, but were instead assigned to special tasks that could most effectively be performed by

women: searching, interrogating and transporting female prisoners; counselling female juveniles; investigating sex offenses and child abuse cases; and attending domestic disturbances.

Since the civil service list of eligible candidates from the last policewoman exam had expired by operation of law, the City, in response to its need, requested in June, 1973, that a new policewoman exam be administered by the Massachusetts Division of Civil Service. When no such test was held, the City requested again. The City then inquired into the possibility of using a valid list of eligible "policewoman" candidates already certified to the nearby City of Taunton. Finally the City was informed by State Civil Service officials that, because of changing employment laws, no future "policewoman" exams would be held, but that the City would have to petition the Massachusetts Commission Against Discrimination for special permission to engage in gender-specific hiring. With such approval, the Civil Service Commission could release a list of female names to the City of New Bedford. The City promptly made such a request on March 29, 1974, which was granted on May 9, 1974.

In the meantime, the Plaintiff had taken the civil service "police officer" exam in October, 1972, however, all the events mentioned above took place before the results of that exam were made available to the City. The results had been delayed due to litigation against the State Division of Civil Service over minority and veteran preferences.

On July 30, 1974 an integrated list of male and female names was certified to the City by the Civil Service Commission. The City conducted interviews and hired a number of male candidates from this list, but no women were hired because they had all scored too low on the exam.

The Plaintiff, however, was mistakenly interviewed by the City. Through an error of the state Civil Service Commission, she was initially ranked high enough on the list to receive an

interview and was rejected because she failed to meet the City's five foot six inch height requirement. After it was discovered that the Plaintiff was not entitled to minority preference, however, the Commission directed that her name be placed lower on the list, to a position in which she would never have been reached for an interview. The District Court found that this calamity resulted in the Plaintiff being denied only an "invalid appointment" because of the operation of the height requirement. At any rate, after corrected placement, no men were hired whose names fell below the Plaintiff's.

During all this time, the City's need for female police officers was becoming urgent due to the retirement and disability of two female officers. At last, the Civil Service Commission certified a list of all female names to the City on August 12, 1974. This "select list" was not derived from the Taunton candidates, as originally planned, but was instead composed of female names extracted from the July 30, 1974 "integrated list" in the order of their respective adjusted scores on the October, 1972 police officer exam. The Plaintiff's name was first on this select list, but she was rejected due to her failure to meet the height requirement. Two other women, whose names ranked below the Plaintiff's, were hired from the all-woman list. Both of these women were taller than five feet six inches.

Plaintiff filed a charge of discrimination with the proper state and federal agencies and then commenced this action in the United States District Court for the District of Massachusetts. At her trial, Plaintiff introduced statistics which proved that over 80% of all women were shorter than five feet six inches while only 20% of men were shorter than that height. Although the relevance of these statistics was objected to, the trial judge found that they established a *prima facie* case of employment discrimination. As a result of the District Judge's finding, the parties entered into a comprehensive stipulation which encompassed all the relief ultimately

awarded by the Court. Notably, the City agreed to place the Plaintiff on the Police Department permanently, regardless of the outcome of the City's announced appeal, although if the City succeeded on appeal her seniority would be adjusted to the date of actual appointment. The trial judge expressly found, however, that the height requirement was not imposed with any discriminatory purpose. Judgment was entered for the Plaintiff and back pay, attorney fees, and reinstatement were ordered.

The City appealed to the Court of Appeals for the First Circuit which reversed the District Court in a unanimous opinion. The crux of this first appellate decision was the observation that it was factually impossible for the Plaintiff to establish a *prima facie* case of employment discrimination given the fact that she was in competition with only women. "The height [requirement] does its dirty work only when there are males...to prefer. Absent this role of disproportionate preferment, the factor no longer distinguishes between sexes...." *Costa* v. *Markey*. 677 F.2d 158, 160 (1st Cir. 1982).

Plaintiff, during the course of this first appeal, relied heavily on the Second Circuit's opinion in *Teal* v. *Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982). The First Circuit had rejected the Plaintiff's application of *Teal*, however, because it was factually inapposite and because it invited scrutiny into every facet of a hiring process even where the end result revealed no evidence of discrimination. Shortly thereafter, this Court affirmed *Teal* and the Plaintiff petitioned the First Circuit for a rehearing, which was granted.

The rehearing panel, rendering its decision in three separate opinions, reversed itself and reinstated the District Court's judgment. The majority opinion stated, as the foundation for its reasoning:

> In this case the City applied the requirements to women only and hired only women. But this is no defense to a

> *prima facie* case of disparate impact discrimination. It seeks to justify the disparate effect of the rule in general by pointing to the end results of one particular application of the rule. This is the "bottom line" approach which is proscribed by *Teal*.

Costa v. *Markey*, 706 F.2d 1, 5 (1st Cir. 1982).

The City then petitioned the First Circuit for a rehearing *en banc* which was also granted. In ordering the *en banc* review, however, the court directed the parties to respond to the following issue:

> Should this Court view the relevant job here at issue (1) as a single job open only to women or (2) as one of a set of police force jobs in general open to both men and women? If the latter, are not men and women in competition for the same jobs?

The *en banc* Court then reversed itself again, reinstating the original appellate opinion which had reversed the District Court. The key to the *en banc* opinion was its meticulous sifting of the facts of the case. Once those facts were fully understo l by the court, it was clear that there existed two separate rounds of hiring. In round one, the integrated list, the Plaintiff was rejected because she scored too low on the exam. In round two, the all-female list, she was excluded because of her height. But since there were no men in the competition of round two, there could have been no discrimination based on sex. Without men in the applicant pool, the height requirement could only distinguish between *tall women* and *short women*.

While the *en banc* Court expressed its prediction that the height requirement would probably have violated Title VII in a different set of circumstances, the Court was "compelled to decide the case on the facts" before it. 706 F.2d 12. And upon

those facts the Court found it was clear that "competition between men and women was at least temporarily suspended so that the City could hire two needed female police officers. Without the height requirement, the City would still have hired only two women. The only difference is that Plaintiff would have been one of them." *Id.*

Reasons for Denying the Petition

I. On the Particular Facts of This Case, It Was Impossible for the Plaintiff To Establish a *Prima Facie* Case of Employment Discrimination.

Once the fact is understood that the City of New Bedford set out in 1973 to hire a woman police employee (whether she was to be known as a "policewoman" or a "female police officer"), the conclusion is inescapable that the Plaintiff could never have established a *prima facie* case. This is because of the two distinct rounds of hiring.

Plaintiff was listed 90th on the first ("integrated") civil service list. Although she was the top female, the last man hired from that list was ranked 56th. Thus in round one the Plaintiff was rejected because of her poor test score. For the City, there was no practical hope of hiring a woman from this list.

When the City resorted to the "select" list for the specific purpose of hiring a woman (by now they needed *two*), there were no men in the applicant pool. In effect, the Plaintiff was given a "second chance," but in this round she was now in competition only with other women.

The key to understanding why the Plaintiff could not establish a *prima facie* case lies not so much in formal legal precedent as in the fundamental dictionary definition of the word "discrimination": to make a choice between two or more options. Before one can discriminate, there must be at least two items from which to make a choice. This Court said in

Griggs v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), that "Discriminatory *preference* for any group, minority or majority, is precisely and only what Congress has proscribed." (emphasis added). Thus under *Griggs* before one can even reach the question of whether a particular selection device has a disparate impact on a protected group, it must be shown that there were two groups from which the device could prefer one over the other. In the present case then, with an all-female applicant pool, it was impossible to make a choice between males and females. And, since the height requirement could not possibly operate to prefer men over women, it cannot be said to have a "disparate impact" on women. The discrimination, or preferential choice, made here was based solely on *height* and not on any protected category (race, religion, sex, etc.).

Another way to show the factual impossibility of Plaintiff's *prima facie* case is to examine her statistics introduced at trial. Here again the foundation of this argument is to understand the fundamental object of statistics: to prove a meaningful comparison between two or more observations. Plaintiff showed that 80% of all women were shorter than 5 feet 6 inches and only 20% of men were thus. These statistics are meaningless because, with no men in the relevant applicant pool, any comparison with men proves nothing.

The purpose for which this Court has long condoned the use of statistics in Title VII cases is to discover whether an employer's hiring practices (or a selection device) operate to select one group disproportionately over another. See *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n. 13 and 14 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 n. 20 (1977). In other words, the rate at which members of one group would be selected at random is compared to the rate at which they are actually selected (or excluded). If the comparison shows a difference above 2 or 3 standard deviations, then disparate impact can be inferred.

Applying this principle to our case, then, even if 100% of all men were taller (*or shorter*) than 5 feet 6 inches, it would still have no effect on the chance of any woman in the applicant pool being selected or excluded. *They operate independently of each other: 80% of all women would still be ineligible.* Since the male height statistics have no effect on the female selection rate, they provide no meaningful comparison upon which a factfinder could have found that women were excluded in excess of the rate at which they would have been excluded at random. This is because the statistics for women were only meaningful to predict their selection rate *among themselves*. For example, if 100% of women were shorter than 5 feet 6 inches, none of them could be selected at random; and if 100% of women were taller than 5 feet 6 inches, all of them could be selected at random. The mens' height statistics have no effect on these mathematical realities. Only when men and women are placed in the same applicant pool together can these statistics predict the rate at which the height requirement will exclude women on the basis of their sex. Without men in the pool, the statistics can only predict the rate at which women are excluded on the basis of their height. Thus, Plaintiff's statistics were meaningless to show that the 5 foot 6 inch height requirement had a disparate impact upon women.[2]

[2] The case law in Title VII cases bears this fact out. In fact, in the paramount statistical proof of discrimination case, *Hazelwood School District* v. *United States*, 443 U.S. 299 (1977), the Court explained at length that the choice of the relevant comparative statistic would mean the difference of a finding of racial discrimination or not. 433 U.S. 311, n. 17. In fact, in *Hazelwood* it was not sufficient to simply compare black teachers hired with the ratio of black teachers available in the geographical area, it was necessary to better qualify that second statistic to define the precise geographical locality the school district could actually draw from.

The need to qualify the second comparative statistic cannot be understated. It has been the death knell to many cases attempting to prove a *prima facie* case of disparate impact by the use of statistics. *Coe* v. *Yellow Freight System*, 646 F.2d 407 (10th Cir. 1981) (Plaintiff failed to establish a *prima facie* case when he attempted to introduce two sets of inappropriate

II. This Court's Decision in *Teal* Does Not Change This Result.

The teaching of *Connecticut* v. *Teal*, 457 U.S. 440 (1982) is really not new. In 1971 the Court, in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), held that a rule barring women with pre-school aged children from employment had a disparate impact upon women where men with pre-school aged children were not likewise rejected. This was so even though 75% to 80% of those ultimately hired were women. The reason given is that a greater percentage of women were foreclosed from the opportunity of employment than were men. The fact that women, as a class, were ultimately benefitted did not repair the damage done to those women who were initially denied the opportunity, and thus was no defense to their *prima facie* case.

Similarly, in *Teal* there was a selection device (a test) which preferentially selected whites. In the long run, however, blacks were ultimately promoted more favorably than whites. Again this Court said that the "bottom line" result does not cure the denial of opportunity to those blacks who failed.

The critical distinction between those cases and the case at bar is this: in *Phillips* and *Teal* there was a selection device that caused one group to be preferred over another on the basis

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statistics comparing irrelevant relationships). *See also DeMedina* v. *Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982) (relevant applicant pool must be qualified by including only applicants with skills likely to apply); *Payne* v. *Travenol Labs*, 673 F.2d 798 (5th Cir. 1982) (relevant comparison was applicants with their own transportation); *Riveira* v. *City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982) (relevant comparison pool was those with requisite skills); *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982) (relevant applicant pool must reside within the geographical area found to be the actual source of applications); *Pope* v. *City of Hickory*, 29 FEP Cas. 399 (D. N.C. 1981), *aff'd* 679 F.2d 20 (4th Cir. 1982) (comparative pool not meaningful because of small size and uncertainty); *United States* v. *County of Fairfax*, 629 F.2d 932 (4th Cir. 1980) (geographical area must be qualified); *Wilmore* v. *City of Wilmington*, 533 F. Supp. 844 (D. Del. 1982) (comparative pool must be qualified with special employment skills).

of race or sex, *and then* some other factor was offered to repair the damage done by the disparate impact. In the instant case, however, there were not two protected groups between which a preference could be made. Men were not preferred over women; only tall women were preferred over short women. There were no women who were initially denied the employment opportunity *on the basis of their sex*. The fact that women were ultimately hired is not a factor subsequently offered to cure the effect of any disparate impact because there was none. The "bottom line" result here (that women were eventually hired) was a foregone conclusion given the fact that being female was a prerequisite to entering the applicant pool.[3] It was not something interposed later down the line in the hiring process to change the result.

The Petitioner incorrectly asserts that *Teal* governs here because there was a "subsequent decision by the City to hire two women" which was intended to "undo the discriminatory effect of the height requirement." Petition at 15. This is plainly against the facts in the record. The City had been actively attempting to hire a woman for over two years before the Plaintiff's name first appeared on a list.

The Petitioner attempts to argue that she (and 80% of all other women) were immediately foreclosed from the opportunity of being a police officer in New Bedford because of the height requirement, and thus the decision to hire a woman later was an attempt to repair the discriminatory damage done. This analysis begs the question, however. The Plaintiff, and other women, were initially excluded because they scored too low on the exam. Later, the Plaintiff and other women were excluded because they were *short*, and not because they were *female*.

Short men were likewise foreclosed from this employment opportunity. Only if the Plaintiff can demonstrate that the height requirement is determinative of *sex* can she make out a case under Title VII.

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[3] Although it is not a crucial issue in this case, it may fairly be said that being female was a bona fide occupational qualification. Viewing it thus further points out the factual impossibility of Plaintiff's *prima facie* case.

Conclusion

While the question presented in the petition has potentially far-reaching consequences, the peculiar facts of the case are not conducive to further review. As the Court of Appeals *en banc* noted, "we are compelled to decide this case on the facts before us." This result was achieved only after three separate hearings before the Court of Appeals. The final result is owed to the lower court's meticulous review of the record and thorough understanding of the facts. Such a set of circumstances is not likely to arise again, and thus makes further review of this case impractical for its limited precedential value. Furthermore, as the Court of Appeals noted, the Plaintiff is presently employed by the New Bedford Police Department, in keeping with its stipulation prior to the District Court judgment.

Respectfully submitted,

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